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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STERLING ELECTRIC, INC.,
Petitioner,

v.

PARTS AND ELECTRIC MOTORS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding, in a federal antitrust tying case, that the "uniqueness" of replacement parts for electric motors was an adequate proxy for a finding of market power in the tying market of replacement parts.

2. Whether a manufacturer with less than *one percent* of the market for the tied product may ever be held liable in a tying case.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Sterling Electric, Inc. hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) affirming the denial of a new trial is reported at 866 F.2d 228. A prior relevant opinion of the court of appeals (App., *infra*, 19a-40a) reversing the grant of judgment n.o.v. and remanding the new trial order is reported at 826 F.2d 712. The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois (April 14, 1986) granting judgment n.o.v. and, in the alternative, a new trial is not reported. App., *infra*, 41a-51a. The order of the district court denying a new trial and entering judgment for respondent on remand is not reported. App., *infra*, 54a-55a.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1988. A petition for rehearing was denied on March 9, 1989. App., *infra*, 52a-53a. On May 18, 1989, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including July 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act (15 U.S.C. § 1) provides in pertinent part:

> Every contract . . . in restraint of trade . . . is declared to be illegal.

Section 3 of the Clayton Act (15 U.S.C. § 14) provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

STATEMENT

1. Petitioner Sterling Electric, Inc. is a small manufacturer of industrial electric motors. During the time relevant to this lawsuit, petitioner had less than one

percent of the market for such motors. App., *infra*, 13a, 20a.[1] In addition to selling these finished products, petitioner also sells unassembled replacement parts for its motors. This is consistent with the general practice in the electric motor industry, whereby each manufacturer makes the replacement parts only for its own motors. App., *infra*, 13a (Posner, J., dissenting). Thus, petitioner's parts fit only its electric motors, and no other manufacturer makes parts for those motors because the market for these parts is so small.

By 1980, petitioner had over 400 nonexclusive wholesale distributors of its motors and replacement parts. Under that marketing system, petitioner's distributors were given no incentive to promote its finished products—electric motors. In 1981 and 1982, petitioner's new management initiated a two-tiered distribution system.[2] This new system was designed to encourage the active promotion and sale of petitioner's finished products. App., *infra*, 42a. Petitioner's management recognized that without continued sales of its electric motors, the market for replacement parts would evaporate and petitioner's very existence would be threatened.

Petitioner's new distribution system established two categories of parts distributors—"stocking" parts distributors, of which there were ten, and "referral" parts distributors. Petitioner sold directly to stocking parts distributors who, in turn, sold to referral parts distributors and to the public. Defendant's Trial Exh. 9. Stocking parts distributors agreed to perform certain activities, including maintaining an effective outside sales force, promoting aggressively petitioner's products and

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[1] Between 1980 and 1984, petitioner's annual sales ranged between $9 and $12 million. App., *infra*, 20a, 44a. By comparison, respondent's annual sales were approximately $14.4 million in 1981. Defendant's Trial Exh. 13.

[2] Under the pre-1981 distribution system as well as the new system, all of petitioner's distributors were and are nonexclusive.

purchasing a minimum number of electrical motors. In return, stocking parts distributors received a substantial discount on replacement parts, paying a lower price than did referral distributors.

Respondent, Parts and Electric Motors, Inc., was a wholesale distributor of petitioner's motors and replacement parts under the pre-1981 system.[3] In response to petitioner's new distribution system, respondent elected to become a stocking parts distributor. Even though it agreed to become a stocking distributor, respondent failed to meet its obligations under the distribution agreement to maintain an effective outside sales force and to purchase the required minimum number of electric motors. Petitioner became concerned that respondent, by accepting the benefits of the agreement—the discounts—without meeting its obligations to sell motors, was taking a "free ride" on stocking distributors who were living up to their obligations.[4] As a result, petitioner repeatedly warned respondent that it was not abiding by the distribution agreement. Nevertheless, respondent refused to satisfy its obligation to purchase electric motors, and accordingly, petitioner terminated its distributor relationship with respondent in October of 1982.

2. Respondent then filed this lawsuit in the United States District Court for the Northern District of Illinois, alleging that petitioner impermissibly tied the sale of its electric motors (the tied product) to the sale of replacement parts (the tying product) in violation of

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[3] Respondent sold and continues to sell a number of other motor manufacturers' electric motors and replacement parts. App., *infra*, 2a.

[4] These concerns were not unwarranted. In 1981, respondent purchased $90,778 worth of electric motors and $160,593 of parts from petitioner. Through nine months of 1982, respondent purchased $43,418 of motors and $293,262 of parts. App., *infra*, 20a. Thus, in 1981 petitioner's sales of motors accounted for 36% of its total sales to respondent, but, in 1982, this fell to 13%.

Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14. At trial, petitioner stipulated that its replacement parts were "unique." These parts were usable only in petitioner's motors, and petitioner was the only manufacturer of replacement parts for its own motors. The jury returned a verdict for respondent and awarded $1,231,992 in damages, which was trebled to approximately $3.7 million.[5] Petitioner moved for judgment notwithstanding the verdict or, in the alternative, a new trial.

The district court granted judgment n.o.v. and, alternatively, a new trial. The court reasoned that, because petitioner "is no more than a pygmy in the electric motor market," there was no substantial danger that petitioner would acquire market power in the tied-product market. App., *infra*, 44a.[6]

3. The court of appeals reversed the judgment n.o.v. and vacated the conditional new trial order. App., *infra*, 40a. That court concluded that petitioner had waived the issue of whether respondent was required to show a substantial threat of market power in the tied-product market.[7] With respect to the elements of a tying case under the antitrust laws, the court held first that electric motors and replacement parts are separate products capable of being tied. App., *infra*, 35a.

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[5] Including attorneys' fees and interest, the total judgment now is approximately $6 million.

[6] Because the district court concluded that this was a sufficient basis to grant judgment n.o.v. and the conditional new trial, it did not address other issues raised by petitioner's post-trial motion.

[7] Nonetheless, the court of appeals stated that petitioner's argument with respect to the tied-product market was unsupported by this Court's opinion in *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U.S. 2 (1984). The court of appeals observed that this Court's "opinion does not seem to suggest any role for the threat of market power in the tied product market as a factor in the analysis." App., *infra*, 32a.

Second, the court rejected petitioner's contention that there was no proof of market power in the tying product. The court of appeals cited this Court's statement in *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U.S. 2, 17 (1984), for the proposition that uniqueness could be used as a proxy for market power. App., *infra*, 36a & n.7. The court then held that petitioner's stipulation of uniqueness satisfied the *Jefferson Parish dicta* and, accordingly, held that the requirement of market power over the tying product (*i.e.*, replacement parts) was satisfied.[8] Rather than determine whether petitioner had actual market power over the tying product, the court of appeals reformulated petitioner's concession that its parts were unique by stating that there was evidence that "no alternative sources existed for Sterling parts" and that "no one but Sterling manufactured parts compatible with Sterling motors." App., *infra*, 36a. Also, the court found that "there are effective economic barriers to entry into the market for parts compatible with Sterling motors since the demand for Sterling parts will accommodate only one manufacturer." *Id.*

Third, the court of appeals rejected petitioner's argument that there was no proof of foreclosure of competition in the electric motor market. The court observed that the jury found that the alleged tie-in arrangement was both a *per se* violation and an unreasonable restraint of trade. The court of appeals stated that "[o]f course, in a *per se* case, injury to competition is in principle conclusively presumed and need not be proved." App., *infra*, 36a (citing *Jefferson Parish*, 466 U.S. at 9-10). The court noted that it was unnecessary to review the findings under the *per se* standard because "the jury concluded that Sterling's distribution arrangement unreasonably restrained competition." App., *infra*, 37a. The court did not analyze the competitive consequences of the

[8] The court of appeals also observed that petitioner had 100% of the market for its parts.

alleged tie and never questioned whether a manufacturer with less than one percent of the tied-product market could conceivably have an anticompetitive impact in that market. Instead, the court stated:

> If Sterling's vertical distribution program is judged only by its competitive consequences, as Sterling argues, there is evidence that Sterling's distributors were forced after the tie-in to increase their purchases of Sterling's motors by more than $250,000, presumably at the expense of Sterling's competitors, and testimony that P & E employees engaged in customer "steering," that is, in diverting customers to Sterling motors over other brands.

App., *infra*, 38a.[9]

The court of appeals concluded that, although the grant of judgment n.o.v. was improper, it could not determine whether the verdict was against the manifest weight of the evidence and therefore remanded the new trial issue to the district court.[10]

4. On remand, the district court concluded that the weight of the evidence supported the jury's verdict and entered judgment for respondent. App., *infra*, 54a-56a. A divided panel of the court of appeals affirmed. App., *infra*, 12a.

The majority refused on the basis of law of the case to reconsider the issues decided by the prior panel, *viz.*,

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[9] There was no record evidence of any actual displacement of sales of petitioner's competitors resulting from petitioner's distribution system.

[10] While the court of appeals recognized that the district court should have the first opportunity to determine whether the verdict was against the manifest weight of the evidence, the court of appeals stated that the district court could proceed with a new trial only if that court believed, "based on some previously unstated but substantial and defensible grounds, that the manifest weight of the evidence favored [petitioner] when assessed against the instructions under which the jury deliberated." App., *infra*, 40a.

whether petitioner had market power over the tying product and whether the tying arrangement adversely affected competition in the tied-product market. App., *infra*, 10a. The court of appeals stated that it would not "reconsider the *P & E* panel's use of *Hyde*, the principal case upon which it relied for the proposition that 'uniqueness' can be a proxy for a more thorough market power analysis." App., *infra*, 10a. The court recognized that

> although high market share alone or the "uniqueness" of a given product may be poor "proxies" for a market power analysis, it cannot be questioned that the majority in *Hyde* sanctioned the use of these factors to indicate the likelihood of market power and, in turn, to trigger the *per se* legal approach to tying cases.

Id.[11]

Judge Posner dissented, stating that the decision to affirm "ratifies a miscarriage of justice" because "[t]here was no antitrust violation, and the defendant has been denied its right of appellate review." App., *infra*, 13a. The dissent observed that because petitioner had only one-tenth of one percent of the market for electric motors, it had only a similar percentage of the market for replacement parts for motors. Judge Posner argued that this could not establish sufficient market power to constitute an illegal tie-in. He added that

> it would be absurd to infer from [the fact that only petitioner's parts fit petitioner's motors], as the jury benightedly did, that Sterling has market power, that is, the power to raise the price of its parts above the price that a competitive market would charge, with-

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[11] While the majority refused to reconsider petitioner's arguments in the context of the motion for a new trial, it recognized that "[a]s Judge Posner stated at oral argument, there is no question that this is a threadbare antitrust claim under both the law of tying cases as it is and, certainly, under tying law as certain people argue it should be." App., *infra*, 12a.

> out losing so many sales as to make the price increase unprofitable.

App., *infra*, 16a-17a.

REASONS FOR GRANTING THE PETITION

At issue in this case is the proper legal analysis under the antitrust laws to apply to a vertical distribution system created by a small manufacturer to encourage its distributors to promote its products. There is no question that the distribution agreement in this case involved tying the finished products and replacement parts through the use of price discounts as part of an overall marketing strategy. The question for this Court, however, is whether there is a need to clarify the tying law under which at least one circuit has permitted a multimillion dollar judgment under the antitrust laws to be entered where a manufacturer controls less than one percent of the market for both products. Judge Posner's dissent below strongly shows that the answer is yes.

The tying doctrine as developed by this Court is designed to prevent the use of market power in one market to impair competition unfairly in a second market. See *Jefferson Parish*, 466 U.S. at 14; *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 11 (1958); *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 611 (1953).[12] The classic illustration of an illegal tie-in involves the sale of a patented computer, for which the manufacturer has a monopoly, tied to the sale of computer cards, which could be manufactured and sold by others but will not be because the sale of the cards is foreclosed by the tie-in. See *International Business Machines Corp.* v. *United States*, 298 U.S. 131 (1936). This

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[12] In *Times-Picayune*, this Court stated that "the essence of illegality in tying arrangements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next." 345 U.S. at 611.

case is a far cry from the archetypical tie-in case, and indeed the court below was able to find an antitrust violation only by failing completely to examine the economic consequences of petitioner's distribution plan in the market for either the tied product or the tying product. Not surprisingly, because of this failure to engage in economic analysis, the court of appeals' approach conflicts with this Court's tying decisions, and particularly its most recent decision in *Jefferson Parish*, which mandated careful market analysis of tying arrangements under either the *per se* or the rule of reason standard. As the Court stated, "any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact." *Jefferson Parish*, 466 U.S. at 18. The court of appeals failed to heed that admonition.

The analysis of the court below also conflicts with decisions of other courts of appeals regarding the proper analysis of market power and economic effects in both the tying and tied markets. The court's reliance on the physical uniqueness of the product as a proxy for market power in the tying-product market conflicts with decisions in the First, Sixth, Ninth and Eleventh Circuits. With respect to the tied-product market, the court's failure to require evidence of an adverse effect on competition is inconsistent with clear holdings of the First, Second, Fifth and Eleventh Circuits. Both of these inter-circuit conflicts warrant review by this Court.

I. This Case Presents An Important Question Of Federal Law Regarding The Use Of Physical Uniqueness Of The Tying Product As A Proxy For Market Power

a. Without market power over the tying product, there can be no anticompetitive "forcing" of a purchaser to buy the tied product and, accordingly, no antitrust violation. See, *e.g.*, *Jefferson Parish*, 466 U.S. at 17-18; *id.* at 37 (O'Connor, J., concurring); *United States Steel Corp.* v.

Fortner Enterprises, Inc., 429 U.S. 610, 614 (1977) (*"Fortner II"*); *Northern Pac. Ry.*, 356 U.S. at 6; *Times-Picayune*, 345 U.S. at 611. But the court of appeals read this requirement out of the law by failing to determine whether petitioner had market power over the tying product. Instead, the panels in the Seventh Circuit seized upon this Court's statement in *Jefferson Parish* that uniqueness may serve as a proxy for market power, and concluded that, because the tying product—replacement parts—is "unique," petitioner had sufficient power over them to foreclose competition in the electric motor market.

No matter what economic consequences a "unique" product may have in some contexts, it is clear in this case that petitioner did not even remotely approach the requisite market power over the tying product necessary to prove a tying claim. Market power exists when a seller has the power to raise prices above competitive levels or to require purchasers to accept other burdensome terms. *Jefferson Parish*, 466 U.S. at 27 n. 46; *Fortner II*, 429 U.S. at 620. Petitioner has no such economic strength. As Judge Posner observed, "[o]ne-tenth of one percent is no one's idea of market power." App., *infra*, 16a.

The Court in *Jefferson Parish* recognized that while the hospital might have had " 'market power' in some abstract sense," it did not have "the kind of market power that justifies condemnation of tying." 466 U.S. at 27. The Court carefully examined the tying market—the market for operating rooms—before reaching this conclusion. *Id.* at 26-28; see *Times-Picayune*, 345 U.S. at 612 (examining comparative marketing data because no patents or copyrights existed to confer market control). The antitrust analysis used by the court of appeals is striking because of the absence of such an inquiry. While petitioner might have had market power over its replacement parts in an "abstract sense," there is certainly no evidence that it had the anticompetitive

power that makes a tying arrangement unacceptable—*i.e.*, the power to raise the prices of its replacement parts above competitive levels. Any attempt by petitioner to raise the prices for its parts would be economic suicide. As Judge Posner observed:

> Sterling could in principle exploit its "monopoly" by setting its price for replacement parts just below the point at which owners of Sterling motors would decide to scrap the motors rather than pay an exorbitant price for the parts necessary to keep them in service. But this would be a short-run game, since as soon as word got out no one would buy Sterling motors.

App., *infra*, 17a.

B. The court of appeals' reliance on the physical "uniqueness" of petitioner's parts was an inappropriate use of a proxy for market power. The mere physical uniqueness of a product does not create a presumption of market power.[13] As four members of this Court observed in *Jefferson Parish*:

> A common misconception has been that a patent or copyright, a high market share, or a unique product

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[13] A patent or copyright may provide a legal monopoly that can, in certain instances, create a presumption of market power. *See, e.g., United States* v. *Loew's Inc.*, 371 U.S. 38 (1962); *United States* v. *Paramount Pictures*, 334 U.S. 131 (1948); *International Salt Co.* v. *United States*, 332 U.S. 392 (1947). *But see A.I. Root Co.* v. *Computer/Dynamics, Inc.*, 806 F.2d 673, 676 (6th Cir. 1986) (rejecting presumption for copyrighted products). It is not the physical uniqueness of a patented product that creates the market power but the inability of competitors lawfully to replicate that product. In addition, while physical uniqueness may create a presumption of market power for certain real property, *see Northern Pac. Ry.*, 356 U.S. at 7; *Baxley-DeLamar Monuments* v. *American Cemetery Ass'n*, 843 F.2d 1154, 1157 (8th Cir. 1988); *Rosebrough Monument Co.* v. *Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1142-43 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982), physical uniqueness, without more, does not confer market power on manufactured products. *See, infra* 14-15.

> that competitors are not able to offer suffices to demonstrate market power. While each of these three factors might help to give market power to a seller, it is also possible that a seller in these situations will have no market power . . . .

Id. at 37 n.7 (O'Connor, J., concurring). This is precisely the situation in this case. The court of appeals needed only to analyze the market for electric motor parts to avoid this "common misconception." Rather than uncritically applying a label based upon a discredited proxy for a finding of market power,[14] the court should have determined whether petitioner had power over price, which it clearly does not.

Even if uniqueness were an appropriate proxy for market power with respect to manufactured products, the court of appeals' application of the uniqueness test conflicts with this Court's decisions in *Fortner Enterprises* v. *United States Steel Corp.*, 394 U.S. 495 (1969) ("*Fortner I*") and *Fortner II*.[15] In those cases, this

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[14] Commentators have harshly criticized the use of proxies for market power over the tying product. *See* R. Bork, *The Antitrust Paradox* 368 (1978) ("The importance of this removal of the requirement of market power is not that it makes the law irrational . . . but rather that it makes the irrationality of the law unconfinable."); Klein & Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J. Law & Econ. 345, 354-56 (1985). *Cf. Business Electronics Corp.* v. *Sharp Electronics Corp.*, 108 S. Ct. 1515, 1520-21 (1988) ("departure from [the rule of reason] standard must be justified by demonstrable economic effect, such as the facilitation of cartelization, rather than formalistic distinctions"); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 58-59 (1977).

[15] In *United States* v. *Loew's Inc.*, 371 U.S. 38, 45 (1962), this Court stated that "[e]ven absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." In that case, however, the films were copyrighted. *Id.* at 48. This Court in *Northern Pacific Ry.* upheld a finding that the petitioner had market power because of its extensive land holdings. 356 U.S.

Court made clear that only *economic* uniqueness, not merely physical uniqueness, created a presumption of market power. *Fortner II*, 429 U.S. at 620; *Fortner I*, 394 U.S. at 505 & n. 2.

Similarly, the Court in *Jefferson Parish* observed that "when the seller offers a unique product, *that competitors are not able to offer*," it is likely that market power exists. 466 U.S. at 17 (emphasis added). The court below failed to determine whether "competitors are not able to offer" the parts for petitioner's motors or whether petitioner enjoyed any cost advantage in the manufacture of replacement parts. In so doing, the court of appeals completely misunderstood the uniqueness issue. In fact, it is not unique for manufacturers of electric motors to have replacement parts that fit only their finished products. Because all motor manufacturers conduct their business in this manner, there is nothing "unique" about petitioner's parts within the relevant market of all parts.[16]

c. The opinion of the Seventh Circuit also conflicts with decisions of other circuits holding that physical uniqueness, by itself, is insufficient to create a presumption of market power. See *Grappone, Inc.* v. *Subaru of New*

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at 7. While the Court did not specify that this was because this land was "unique," it relied upon the unique nature of these land holdings to justify a finding of market power. Consistent with this Court's later holding in *Fortner II*, the dissent stated that the district court should have determined "uniqueness" of the landholdings in terms of quality or use. 356 U.S. at 16 (Harlan, J., dissenting).

[16] Of course, "every manufacturer has a natural monopoly in the sale of his own products," but that "natural monopoly" does not properly equal market power in antitrust terms. *Parsons* v. *Ford Motor Co.*, 669 F.2d 308, 312 (5th Cir.), *cert. denied*, 459 U.S. 832 (1982); *see Transource International, Inc.* v. *Trinity Industries, Inc.*, 725 F.2d 274, 283 (5th Cir. 1984); *Domed Stadium Hotel, Inc.* v. *Holiday Inns, Inc.*, 732 F.2d 480, 489 (5th Cir. 1984); *cf. United States* v. *E.I. duPont deNemours & Co.*, 351 U.S. 377, 393 (1956).

England, Inc., 858 F.2d 792, 797-98 (1st Cir. 1988) (no showing of market power when Subaru has minuscule market share, no patents or copyrights and could not raise prices significantly above the competitive level); *Mozart Co.* v. *Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1346 (9th Cir. 1987) (uniqueness of Mercedes-Benz to customers does not create market power to force dealers to purchase replacement parts), *cert. denied*, 109 S. Ct. 179 (1988); *A.I. Root Co.* v. *Computer/Dynamics, Inc.*, 806 F.2d 673, 677 (6th Cir. 1986) (2 to 4% market share inadequate to show market power even though software was only system available for particular computer); *Spartan Grain & Mill Co.* v. *Ayers*, 735 F.2d 1284, 1288 (11th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985).[17] Consistent with *Fortner II*, other circuits look beyond the fact that a product is physically unique and examine (1) whether the producer has some economic or cost advantage over competitors, see *Grappone*, 858 F.2d at 798; *Spartan Grain & Mill*, 735 F.2d at 1288,[18] or (2) whether the producer possesses actual market power to force a dealer to purchase the tied product, see *Mozart*, 833 F.2d at 1346.[19]

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[17] The court of appeals' opinion is also fundamentally at odds with decisions of other courts of appeals that have found that market power exists as a result of uniqueness. *See Tic-X-Press, Inc.* v. *Omni Promotions Co.*, 815 F.2d 1407, 1420 (11th Cir. 1987) (exclusive leasing agents for Omni in Atlanta had market power because only concert site with over 4,000 seats, substantial economic advantages, potential competitors could not lease Omni and cost of building competing arena prohibitive); *Rosebrough Monument Co.* v. *Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1142 (8th Cir. 1981) (high cost and restrictive regulations make construction of new cemetery in relevant market almost prohibitive), *cert. denied*, 457 U.S. 1111 (1982). These courts require more than a showing of mere physical uniqueness.

[18] *See also Carpa, Inc.* v. *Ward Foods, Inc.*, 536 F.2d 39, 48 (5th Cir. 1975) ("Uniqueness presupposes that competitors are in some way foreclosed from offering the distinctive product.").

[19] In *Mozart*, the tying product was the Mercedes-Benz franchise trademark and automobiles while the tied product was replacement

The holding of the Seventh Circuit which permits mere physical uniqueness to be equated with market power without any economic analysis is an unjustified departure from the holdings of this Court and other courts of appeals. As most courts have recognized, market power is significant for tying law purposes only because it gives the possessor the power to force unwanted purchases of the tied product with a resulting anticompetitive effect in the tied-product market. Here, there is no such power and no one could seriously contend that there is. Accordingly, the decision below warrants review by this Court.[20]

II. This Petition Raises An Important Question Of Federal Law Regarding The Need For Proof In A Tying Case Of An Adverse Effect On Competition In The Tied-Product Market

The tying doctrine, as developed by this Court, is designed to protect competition in the market for the tied product. See, *infra*, 9. The court of appeals has held that petitioner may be liable for a tying violation even though it has less than one percent of the tied-product

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parts. The Ninth Circuit refused to permit a finding of market power based upon the uniqueness of Mercedes automobiles, stating that "it is by no means clear that franchises (dealers) view the Mercedes" as unique. 833 F.2d at 1346. "The critical issue is whether [the distributor] possesses the 'market power' to force dealers to purchase the tied product rather than acquire the franchise to sell a different automobile." *Id.*

[20] Two members of this Court have expressly criticized the failure to engage in market analysis in a tying case and urged review because:

> The Court of Appeals looked to market power over "locked in" customers who had already purchased petitioner's wares, viewed the copyright on the operating system as creating a presumption of market power, and seemingly concluded that forcing power is sufficiently established to demonstrate *per se* antitrust liability if some buyers find the tying product unique and desirable.

Data General Corp. v. *Digidyne Corp.*, 473 U.S. at 909 (White, J., dissenting from denial of *cert.*) (joined by Blackmun, J.).

market. But petitioner's minuscule market share effectively prevents its marketing strategy from having any appreciable adverse effect on competition in the market for electric motors.

In *Jefferson Parish*, this Court specified that certain tying arrangements are illegal when market power is exploited "by attempting to impose restraints on competition in the market for a tied product." 466 U.S. at 14; see *id.* at 36 (O'Connor, J., concurring); *Times-Picayune*, 345 U.S. at 614 ("common core of adjudicated unlawful tying arrangements [includes] economic harm to competition in the 'tied' market").[21] Tying arrangements exist when defendants "have foreclosed competition on the merits in a product market distinct from the market for the tying item." *Jefferson Parish*, 466 U.S. at 21. The Court stated that

> [t]he legality of petitioners' conduct depends on its competitive consequences, not whether it can be labeled "tying." If the competitive consequences of this arrangeemnt are not those to which the *per se* rule is addressed, then it should not be condemned irrespective of its label.

Id. at 21 n.34.[22] This Court also has stated that "tying may have procompetitive justifications that make it in-

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[21] The majority in *Jefferson Parish* quoted extensively from Justice White's dissent in *Fortner I*, which focused exclusively on the potential anticompetitive effect in the tied-product market. "There is general agreement in the cases and among commentators that the fundamental restraint against which the tying proscription is meant to guard is the use of power over one product to attain power over another, or otherwise to distort freedom of trade and competition in the second market." *Id.* at 13 n.19, quoting *Fortner I*, 394 U.S. at 512-14 (White, J., dissenting).

[22] As this Court observed in *Times-Picayune*:

> the effect on competing sellers attempting to rival the "tied" product is drastic: to the extent the enforcer of the tying arrangement enjoys market control, other existing or potential sellers are foreclosed from offering up their goods to a free

appropriate to condemn without considerable market analysis." *NCAA* v. *Board of Regents*, 468 U.S. 85, 104 n.26 (1984), citing *Jefferson Parish*, 466 U.S. at 11-12. In the absence of such analysis, the court of appeals' assertion that petitioner, with its one-tenth of one percent share of the electric motor market, can effectively exclude its competitors from the marketplace is fanciful.

The court of appeals' error appears to emanate from this Court's sharply divided opinions in *Jefferson Parish* on the quantum of economic effect in the tied market required to prove an antitrust violation. While this Court was unanimous in reaffirming that the vice of tie-ins is their impact on competition in the market for the tied product, the Court was split sharply over the level of competitive impact necessary to establish a tying claim. Compare *Jefferson Parish*, 466 U.S. at 31 ("actual adverse effect on competition") with *id.* at 38 (O'Connor, J., concurring) ("substantial threat that the tying seller will acquire market power in the tied-product market"). The court of appeals in this case held that petitioner waived any argument concerning the need to show a substantial threat of market power. Petitioner did, however, argue that respondent must demonstrate an adverse effect on competition in the tied-product market in order to prove a tying violation—an impossibility in light of petitioner's tiny market share. The court of appeals rejected this argument, but did so on a clearly inappropriate basis.

The court below observed that "there is evidence that [petitioner's] distributors were forced after the tie-in to increase their purchases of [petitioner's] motors by more than $250,000, presumably at the expense of [petitioner's] competitors." *Id.* This is not, however, evidence of an adverse effect on *competition*. This is evidence

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competitive judgment; they are effectively excluded from the marketplace.

345 U.S. at 605.

that a not insubstantial amount of commerce is foreclosed by the tie, see *Jefferson Parish*, 466 U.S. at 16; *Fortner I*, 394 U.S. at 501-02. But the kind of proof of an effect on commerce relied upon by the court below is wholly separate from an adverse effect on competition, which also must be shown to prove an illegal tie-in.[23]

At bottom, the increase in sales is evidence of only one thing—a small manufacturer was able to compete more effectively on an interbrand basis. Even if the court of appeals was correct in "presuming" that petitioner's increased sales displaced those of its competitors, this is far from showing an *adverse* effect on competition, or the potential for such an effect, as this Court has required for the last decade in all nonprice vertical restraint cases. See *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 108 S. Ct. 1515, 1525 (1988); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 58-59 (1977). The decision below disregards the teaching of these cases that the antitrust laws must not be used to thwart efforts by small sellers to gain a competitive edge.

The court of appeals also relied upon evidence that there was "steering" of customers to petitioner's motors. That activity, however, merely demonstrates that petitioner's distribution system helped it compete more effectively with other brands; it is not evidence of any foreclosure of competition in the sale of electric motors. There was no evidence that customers sophisticated

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[23] This was not the first occasion on which the court of appeals confused these issues. The court noted that

> [petitioner] points to the statement in its motion [for judgment n.o.v.] that "plaintiff has failed to demonstrate the requisite anti-competitive impact on the relevant market." We agree with [respondent] that "requisite impact" appears to invoke a dollar volume and not to implicate market power.

App., *infra*., 27a n.2.

enough to know the differences between petitioner's motors and its competitors' motors were not able to purchase those other motors, even from respondent which sold many other brands of motors.[24] An effect on competition in the tied product market under the rule of reason requires "an empirical demonstration concerning the effect of the arrangement on price or quality." *Jefferson Parish*, 466 U.S. at 30 n.49. There was no showing regarding price or quality of petitioner's motors *vis-a-vis* those of its competitors.[25]

The court of appeals failed to examine the effect or potential effect in the market for the tied product to determine whether the alleged tying arrangement imposed a restraint on competition in the electric motor market as a whole. The court simply ignored the fact that petitioner had less than one percent of the market. Without a showing of actual adverse effect on competition, there is no violation of the antitrust laws. *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 297 (1985).

In contrast to the approach below, other courts of appeals have recognized that there simply is no tying violation without a showing of an adverse effect on competition. In *Grappone Inc.* v. *Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988), the First Circuit

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[24] In *Jefferson Parish*, this Court stated that "there is no evidence that any patient who was sophisticated enough to know the difference between two anesthesiologists was not also able to go to a hospital that would provide him with the anesthesiologist of his choice." 466 U.S. at 30.

[25] There was no evidence that petitioner's market share increased as a result of the alleged tying arrangement. Rather, the court of appeals *presumed* that the sale of petitioner's electric motors displaced those of its competitors. App., *infra*, 38a. But, even if petitioner were able to increase its market share, this demonstrates only successful interbrand competition, one of the goals of the antitrust laws.

stated that "[o]nly if the tie significantly reduces the opportunities to sell [the tied product] can the tie significantly increase the Seller's power in respect to [the tied product], and thereby (*i.e.*, by raising entry barriers) increase the seller's power in respect to [the tying product]." *Id.* at 796.[26] In addition, other courts of appeals have recognized that under a rule of reason standard, the plaintiff must show, as an element of his case, that there were anticompetitive effects in the tied-product market. See *Amey, Inc.* v. *Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1503 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986); *Crossland* v. *Canteen Corp.*, 711 F.2d 714, 722 (5th Cir. 1983); *Bob Maxfield, Inc.* v. *American Motors Corp.*, 637 F.2d 1033, 1037 (5th Cir.), *cert. denied*, 454 U.S. 860 (1981); *Yentsch* v. *Texaco*, 630 F.2d 46, 57 (2d Cir. 1980). The analysis of the court of appeals in this case is not consistent with that employed by other courts and accordingly this Court should grant certiorari to resolve the differences.

* * * *

The potential ramifications of the Seventh Circuit's opinion are far-reaching. At bottom, the court held that a manufacturer with less than one percent of the market for a finished product violates the antitrust laws by offering a greater discount on replacement parts to distributors who agree to sell a minimum quantity of the finished product. That is not conduct that the antitrust laws were intended to prevent.

The court of appeals' decision threatens the ability of every small manufacturer that sells finished goods and replacement parts for those goods to compete effectively in the sale of the finished goods. But larger manufacturers—manufacturers whose actions would be more

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[26] *Cf. Fox Motors, Inc.* v. *Mazda Distributors (Gulf), Inc.*, 806 F.2d 953, 958-59 (10th Cir. 1986) (allocation system not *per se* illegal because no foreclosure of competing automobile manufacturers).

likely to have an adverse effect on competition—could escape liability under the simplistic test applied here by the court of appeals. If petitioner had 40 percent of the electric motor market, for example, there would be a more significant aftermarket for replacement parts for its motors and other companies would make and sell these parts. Under the Seventh Circuit's view, because petitioner's parts would no longer be "unique," it would not have market power in the tying product.[27] Moreover, the fact that petitioner has less than one percent, rather than 40 percent, of the tied product market—the market the tying doctrine is intended to protect—was not considered by the court of appeals. The decision makes no sense as a matter of economic policy and constitutes a perverse application of the antitrust laws to thwart rather than to promote the competitive process. Accordingly, the Court should grant the petition to clarify the application of the antitrust laws in this area of vital concern to small manufacturers and distributors.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[27] More broadly, the court of appeals' opinion permits a finding of market power whenever a manufacturer sells a physically unique product. The court's use of uniqueness as a proxy, unrestrained by market analysis, threatens the ability of large and small manufacturers alike to compete effectively and efficiently.

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-1609

PARTS AND ELECTRIC MOTORS, INC.,
an Illinois corporation,
Plaintiff-Appellee,
v.

STERLING ELECTRIC, INC.,
a Delaware corporation,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 83 C 2349—James Holderman, *Judge*

ARGUED SEPTEMBER 29, 1988—DECIDED DECEMBER 1, 1988

Before BAUER, *Chief Judge*, POSNER, and COFFEY, *Circuit Judges.*

BAUER, *Chief Judge.* This antitrust case is before us for the second time. *See Parts and Electric Motors, Inc. v. Sterling Electric, Inc.*, 826 F.2d 712 (7th Cir. 1987) (hereinafter *P&E* I). In our view, it should not be. Here is why.

I.

As set forth in our first opinion, when A.O. Smith Corporation acquired defendant-appellant Sterling Electric, Inc. (Sterling) in May 1980, plaintiff-appellee Parts and Electric Motors, Inc. (P&E) was one of the largest of over four hundred nonexclusive wholesale distributors of Sterling electric motors and replacement parts, although it always carried and continues to carry a number of other brands of electric motors and/or parts. At that time, Sterling implemented a new distribution program, under which Sterling contracted with ten "stocking" parts distributors, including P&E, and a number of "referral" parts distributors. By agreement, stocking distributors were able to purchase Sterling parts at lower prices than referral distributors in return for purchasing and promoting minimum quantities of Sterling electric motors. Sterling thus conditioned its stocking distributors' rights to purchase Sterling parts upon their purchase of a quota of Sterling motors.

In the summer of 1982, Sterling warned P&E to buy more motors or risk termination of its right to buy both Sterling motors and parts. In response, P&E began steering customers toward Sterling motors even though, absent Sterling's warning, it would have recommended other brands. Although P&E boosted its purchase of Sterling motors somewhat in June and August of 1982, Sterling terminated P&E the following October because it regarded P&E's level of Sterling motor purchases as insufficient.

On April 4, 1983, P&E filed this action, charging that Sterling had violated section 1 of the Sherman Act, 15 U.S.C. § 1, and section 3 of the Clayton Act, 15 U.S.C. § 14, by tying sales of its electric motors (the "tied" product) to sales of its replacement parts (the "tying" product). After a trial in which P&E presented evidence with respect to the elements of a *per se* as well as a rule-of-reason tying claim, the jury returned a verdict for

P&E. According to its answers to special interrogatories, the jury found that P&E had proved all the elements of its *per se* claim and, in addition, that Sterling's conduct amounted to an unreasonable restraint of trade. The jury fixed P&E's damages at $1,231,992, which amount was trebled to $3,695,976.

Sterling filed an alternative motion for a judgment notwithstanding the verdict or for a new trial, arguing, *inter alia*, that "even if the Sterling distribution program were a tying arrangement, plaintiff has failed to demonstrate the requisite anticompetitive impact on the relevant market." On April 14, 1986, the district court set aside the jury's verdict for P&E, granted Sterling's motion for judgment n.o.v., and granted conditionally Sterling's motion for a new trial contingent upon reversal of the judgment n.o.v. The district court held that the case "should not have been submitted to the jury because, among other things, the evidence clearly shows that P&E failed to satisfy the threshold criterion 'that the tying seller [Sterling] will acquire market power in the tied product [electric motor] market.'" In doing so, the district court relied upon *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 674 (7th Cir. 1985) (quoting *Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Dev. Co.*, 758 F.2d 203, 210 (7th Cir. 1985)), *cert. denied*, 475 U.S. 1129 (1986), an opinion we issued after the jury returned its verdict and judgment was entered in this case, and after Sterling filed its alternative motion for judgment n.o.v. or for a new trial.

P&E appealed from the district court's ruling, which brings us to our opinion in *P&E* I, in which the panel held initially that "even if a substantial threat of market power in the tied product is an essential element of a tying case, this point was not raised and preserved in the trial court for purposes of the judgment n.o.v." *Id.* at 717. The same was true with respect to the conditional grant of a new trial, the panel held, noting that "the

district court conditionally granted the new trial based on a legal theory that Sterling had failed to raise at trial" and that "[e]ven if Sterling should be correct in its current view of the tied market power issue, it cannot obtain a new trial based on a legal issue that it failed to raise at trial." *Id.* The panel refused to take the extraordinary action of ordering a new trial on grounds not properly preserved because the "district court's failure to instruct the jury that market power in the new motor market was an essential element of the claim against Sterling was not plain error," and because it was not unfair to require Sterling "to live with the theory it presented at trial." *Id.* at 718. To the extent the district court's conditional grant of the new trial relied on the tied market power argument, therefore, it had to be reversed. *Id.*

The *P&E* I panel next considered Sterling's alternative arguments in support of the judgment n.o.v. and the conditional grant of a new trial. *Id.* Two of Sterling's alternative contentions are relevant here: (1) that there was no proof of market power in the tying product market; and (2) that there was no proof of any foreclosure of competition in the tied product market. *Id.* The panel first considered and rejected these alternative contentions as potential support for the judgment n.o.v. It then concluded that, under the instructions given, these same arguments did not provide alternative grounds for a new trial, and fashioned its mandate to the district court as follows:

> In this case . . . the district court has not stated that the jury's verdict was contrary to the weight of the evidence when assessed against the instructions that guided the jury's deliberations. Moreover, the record, viewed from our comparatively remote vantage point, reveals no such imbalance. Nevertheless, we are reluctant to ignore the possibility that the district court perceived such an imbalance but declined to discuss

> it in the belief that Sterling's tied market power argument obviated the need to elaborate on these "other things." We will therefore remand the retrial order for clarification on this point. If the conditional retrial order rested solely on the stated grounds, judgment will be entered for P&E. If, on the other hand, the district court also believed, based on some previously unstated but substantial and defensible grounds, that the manifest weight of the evidence favored Sterling when assessed against the instructions under which the jury deliberated, then the court may proceed with the new trial.

Id. at 722.

The district court on remand provided the "clarification" the *P&E* I panel requested. After "review[ing] the record and the positions presented by the parties," the district court held that "the jury's verdict was not against the manifest weight of the evidence when assessed in the light of the instructions that guided the jury's deliberations." Consistent with the panel's opinion in *P&E* I, the district court entered judgment for P&E.

II.

This is Sterling's appeal from the district court's denial of a new trial on remand. Sterling mounts a two-pronged attack. First, Sterling asserts, the district court erred in denying a new trial because "P&E failed to prove that Sterling possesses market power in the tying product market." Second, Sterling argues, "P&E failed to prove that Sterling forced purchasers to buy a second unwanted product and thereby foreclosed competition." Sound familiar? We think so. The former assertion resembles a great deal Sterling's alternative argument for post-trial relief in *P&E* I that "there was no proof of market power in the tying product market." *P&E* I, 826 F.2d at 719. The latter strongly resembles Sterling's alternative argu-

ment in *P&E* I that "there was no proof of any foreclosure of competition in the tied product market." *Id.*

Ordinarily, matters decided on a prior appeal become the law of the case to be followed on a later appeal. *Walsh v. Mellas*, 837 F.2d 789, 796 (7th Cir.), *cert. denied*, 108 S. Ct. 2832 (1988). As the Fifth Circuit has explained, the law of the case doctrine

> is based on the salutory and sound public policy that litigation should come to an end. It is predicated on the premise that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members," and that it would be impossible for an appellate court to perform its duties satisfactorily and efficiently and expeditiously "if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal" thereof.

Id. (quoting from *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967)). Thus, although it is not an "immutable concept," *id.* at 789, the doctrine should be applied unless unusual circumstances or a compelling reason render it inapplicable. *Chicago & North Western Transportation Co. v. United States*, 574 F.2d 926, 930 (7th Cir. 1978); *see also Shakman v. Dunne*, 829 F.2d 1387, 1393 (7th Cir. 1987) ("law of the case doctrine 'is not to be lightly disregarded'"), *cert. denied*, 108 S. Ct. 1026 (1988). These circumstances include "(1) substantial new evidence introduced after the first review, (2) a decision of the Supreme Court after the first review that is inconsistent with the decision on that review, and (3) a conviction on the part of the second reviewing court that the decision of the first was clearly erroneous." *Chicago & North Western*, 574 F.2d at 930.

It is, of course, critical to determine what issues were actually decided on the prior appeal in order to define the

law of the case. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982). As a general rule, the doctrine does not extend to issues not presented or decided on the prior appeal and does not include questions present in a case and which might have been decided but were not. *Conway v. Chemical Leaman Tank Lines*, 644 F.2d 1059, 1062 (5th Cir. 1981) (quoting *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 663 (5th Cir. 1974); *Gertz*, 680 F.2d at 533 ("observations, commentary, or mere dicta touching upon issues not formally before the court do not constitute binding determinations"). On the other hand, " 'if the issues were decided either expressly or by necessary implication, those determinations of law will be binding on remand and on a subsequent appeal.' " *Conway*, 644 F.2d at 1062 (quoting *Lehrman*, 500 F.2d at 663).

Sterling contends that "this appeal presents different issues in the new trial context than could be developed in the prior appeal." One "fundamental" difference, Sterling asserts, is in the nature and level of evidence needed to withstand Sterling's arguments for a new trial as opposed to a judgment n.o.v. Sterling correctly points out that "attenuated" evidence that would preclude granting a judgment n.o.v. can still be insufficient to support a jury verdict under the analysis applicable to a new trial motion.

True. But the *P&E* I panel was well aware of this. Indeed, it discussed Sterling's alternative arguments for post-trial relief separately under the different standards of review for judgments n.o.v. and grants of new trials. Notably, before the panel considered Sterling's alternative contentions in support of the judgment n.o.v., it commented that "the standard of review presented Sterling with a difficult obstacle" because "there must be such a failure of evidence that 'reasonable men in a fair and impartial exercise of their judgment' could not have reached the same conclusion as the jury." *P&E* I, 826

F.2d at 718. And before turning to the issue whether Sterling presented alternative support for the district court's conditional grant of the new trial, the panel recognized that this court ordinarily "accords great deference to a district court's grant or denial of a new trial motion," especially with respect to decisions based on the trial court's assessment of the weight of the evidence. *Id.* at 721.

That this appeal now comes before us only in "the new trial context," then, means nothing. The *P&E* I panel already ruled within both the judgment n.o.v. *and* the new trial contexts. The problem thus remains that if the issues raised here are in fact the same as those discussed and decided in *P&E* I, this appeal is precluded by the law of the case doctrine, unless an exception to the doctrine applies.

As noted, the first of the two issues raised by Sterling on this appeal is that "P&E failed to prove that Sterling possesses market power in the tying product market." The *P&E* I panel had this to say on that point:

> [O]n the issue of market power in the tying product, Sterling conceded at trial that it has 100% dominance in the market for Sterling parts and that Sterling parts are unique. When the seller's share of the market is high, or when the seller offers a unique product that competitors are not able to offer, the likelihood is that market power exists. [*Jefferson Parish Hosp. Dist. No. 2 v. Hyde*], 466 U.S. [2], 17 [(1984)].

Id. In a footnote to this passage, the panel elaborated:

> The Supreme Court's characterization of "market power," *see Hyde*, 466 U.S. at 13-14, 104 S. Ct. 1558-59, has been alternatively stated in this circuit as "power over price," or the ability to induce buyers to pay more money by cutting back the supply of goods available for purchase. *Will*, 776 F.2d

> at 671. The best way to show power over price is to establish directly that the price of the tied package is higher than the price of components sold in competitive markets. *Id.* at 671-72. However, in the absence of direct evidence to this effect, a plaintiff may demonstrate market share or uniqueness as proxies for power over price. *Id.* at 673; *see also Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611-13, 73 S. Ct. 872, 881-83, 97 L.Ed. 1277 (1953) (on market dominance); *Fortner [Enters. v. United States Steel Corp.]*, 394 U.S. at 504-05, 89 S. Ct. at 1529-30 (on tying).

Id. n.7. Moreover, with respect to the tying product market, the panel found that

> [a]dditional evidence substantiated Sterling's market power. In addition to testimony from P&E's expert witness directly on point, there was evidence that no alternative sources existed for Sterling parts; that no one but Sterling manufactured parts compatible with Sterling motors; and that there are effective economic barriers to entry into the market for parts compatible with Sterling motors since the demand for Sterling parts will accommodate only one manufacturer. In addition, P&E adduced evidence that showed that there was general acceptance of the tie among Sterling distributors. The existence of several tying arrangements provides significant evidence of a defendant's power to restrain free competition.

Id. Finally, the panel also noted that the jury specifically determined in its answer to a special interrogatory that "Sterling 'possessed the ability to use dominance over the supply of Sterling replacement parts or [sic] force others to buy . . . other products,' " *id.* at 719, and that this amounted to a finding of market power in the tying product market, *id.*

Despite this, Sterling claims that the tying product market issue on this appeal is "substantively" different. Sterling says it demonstrates on this appeal that uniqueness no longer permits a presumption of market power in the tying product market and that "the physical uniqueness of its parts, as opposed to economic uniqueness, would not support the presumption in any event." But Sterling does not raise a new issue, it merely shoots more bullets at the same target.

What Sterling really is asking on this appeal is for this panel to reconsider the *P&E* I panel's use of *Hyde*, the principal case upon which it relied for the proposition that "uniqueness" can be a proxy for a more thorough market power analysis. We decline to do so. To begin with, it is not even clear whether Sterling argues that the *P&E* I panel's use of uniqueness as a proxy for market power was clearly erroneous when it rendered its decision. Indeed, it seems to us that Sterling could not make such an argument, for although high market share alone or the "uniqueness" of a given product may be poor "proxies" for a market power analysis, it cannot be questioned that the majority in *Hyde* sanctioned the use of these factors to indicate the likelihood of market power and, in turn, to trigger the *per se* legal approach to tying cases. In any event, under the clearly-erroneous standard, we cannot meddle with a prior decision of this or a lower court simply because we have doubts about its wisdom or think we would have reached a different result. To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week-old. unrefrigerated dead fish.

To be clearly erroneous, then, the *P&E* I panel's decision must be dead wrong, and we do not believe it is. Although Sterling's argument that economic, as opposed to physical, uniqueness triggers the *Hyde* presumption in

favor of market power is persuasive, it cannot change our view of this case. First, this argument strikes us as an attack not just on the *P&E* I panel's decision, but also the Court's opinion in *Hyde*, for it is precisely Sterling's point—that traits having little economic significance can end up trggering a *per se* approach to an alleged tie-in—that militates against the use of proxies for market power in tying cases, the practice sanctioned in *Hyde*. In addition, the panel in *P&E* I arguably grounded its decision to use uniqueness as a proxy for market power in the tying product on more than just the physical qualities of Sterling replacement parts. The panel did find evidence that other competitors were not able to offer parts compatible with Sterling Motors because of effective barriers to entry in that the demand for Sterling parts could accommodate only one manufacturer. Finally, Sterling contributed to its present dilemma by conceding that its replacement parts were unique. At best, then, Sterling can only argue that we might conclude, after considering how other courts of appeals have construed *Hyde* and other Supreme Court decisions, that the *P&E* I panel erred in light of those decisions. But none of the authority cited by Sterling to persuade us to reconsider the panel's construction of *Hyde* is controlling and therefore cannot implicate the "subsequent authority" exception to the law of the case doctrine. On the market power in the tying product issue, then, nothing saves Sterling from that doctrine's grasp.

The same goes for Sterling's second argument on this appeal: that "P&E failed to prove that Sterling forced purchasers to buy a second unwanted product and thereby foreclosed competition." On this, the *P&E* I panel found

> evidence that Sterling's distributors were forced after the tie-in to increase their purchases of Sterling's motors by more than $250,000, presumably at the expense of Sterling's competitors, and testimony that P&E employees engaged in customer "steering," that

> is, in diverting customers to Sterling motors over other brands.

Id. at 721. "The effect of Sterling's tie-in," said the panel, "could reasonably be perceived by the jury as giving a competitive edge to Sterling products based not on their merits, but on Sterling's tie." *Id.*

Sterling nevertheless argues that the issue is different this time around. According to Sterling, it presented in *P&E* I a brief "factual" argument that competition in the tied product market was not affected by Sterling's distribution practices. The thrust of its present argument, says Sterling, is that Sterling's distribution plan is not "legally or factually of a type that forced P&E to purchase unwanted Sterling Motors." Again, same issue, new arguments, none of which implicates an exception to the law of the case doctrine. The prior panel's finding precludes review of any new factual arguments, and Sterling's new legal argument is not based on any new controlling authority.

In short, this case should not be here. In our view, it represents Sterling's second attempt to wriggle out of a legal theory it argued unsuccessfully to the jury. We can understand why Sterling has tried to do so. As Judge Posner stated at oral argument, there is no question that this is a threadbare antitrust claim under both the law of tying cases as it is and, certainly, under tying law as certain people argue it should be. But under the instructions given—instructions Sterling must live with—both the district court and the prior panel have now ruled that there was sufficient evidence to support the jury's verdict against Sterling. And like the panel in *P&E* I, we do not believe that it is unfair to require Sterling to live with the theory it presented at trial.

AFFIRMED.

POSNER, *Circuit Judge*, dissenting. The decision to affirm this antitrust judgment for $3.7 million (exclusive of interest, which has been accumulating since 1985, and attorney's fees) ratifies a miscarriage of justice. There was no antitrust violation, and the defendant has been denied its right of appellate review.

P&E, the plaintiff, is a wholesale distributor of industrial motors and parts for motors, while Sterling, the defendant, is a small manufacturer of such motors—the judgment is equal to between a third and a half of Sterling's entire annual revenues. The practice in the motor industry is that each manufacturer makes the replacement parts for its own motors. These replacement parts are not interchangeable; so only Sterling makes replacement parts for Sterling motors. Sterling offered P&E and its other distributors (none of whom distributes Sterling motors exclusively—all carry other motors as well) a discount on replacement parts if they would promote Sterling motors vigorously. The theory of the lawsuit is that Sterling tied its motors to its replacement parts—over which it has a "monopoly"—by conditioning P&E's right to buy the replacement parts on P&E's agreeing to buy more motors than it wanted. The replacement parts are thus the tying product, and the motors the tied product.

P&E, skillfully represented, won from a jury the damages award that this court upholds today. But Judge Holderman granted Sterling judgment notwithstanding the verdict. Sterling had moved in the alternative for a new trial, and the judge granted that motion, too (conditionally, of course—see Fed. R. Civ. P. 50(c)(1)). The only ground for the judge's action either in granting judgment n.o.v. or granting a new trial was that P&E had failed to prove that Sterling had any market power in the market for industrial motors—the tied market. Sterling's share of that market is one-tenth of one percent. Since the objective of the tying doctrine is to pro-

tect competition in the tied market, the plaintiff must show that the defendant has enough market power, present or prospective, in that market to make the tie-in a threat to competition. See *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 674 (7th Cir. 1985; *Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Development Co.*, 758 F.2d 203, 210-11 (7th Cir. 1985); *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 815 (1st Cir. 1988); *Hand v. Central Transport, Inc.*, 779 F.2d 8, 11 (6th Cir. 1985) (per curiam).

P&E appealed, and this court reversed, 826 F.2d 712 (7th Cir. 1987), holding that Sterling had forfeited the argument that it lacked market power in the motors market by failing to make the argument in its motion for a directed verdict. Grounds not advanced in that motion cannot be advanced in the motion for judgment notwithstanding the verdict. *Kinzenbaw v. Deere & Co.*, 741 F.2d 383, 387 (Fed. Cir. 1984).

Sterling argued that the grant of its motion for judgment notwithstanding the verdict could be upheld on alternative grounds, not reached by the district court: that there was no basis for the jury's finding that it had market power in the tying market (replacement parts), and that there was no basis for the finding that it had conditioned P&E's right to purchase replacement parts on P&E's agreeing to buy more motors (without such a condition, there would be no tie-in). We held that there was sufficient evidence on both points to defeat judgment n.o.v.

The court also had before it the district judge's alternative ruling that Sterling was entitled to a new trial. That ruling could not stand on the only ground that the judge had offered for it—the absence of market power in the motors market—because Sterling had waived that ground by failing to advance it during the trial. The

court then considered whether there might be an alternative basis for granting Sterling's motion for a new trial. It said, "While the record contains too much support for P & E's claims to justify a judgment n.o.v., we are not now in a position to say that P & E's proof was too strong for the district court to have concluded that the manifest weight of the evidence favored Sterling." 826 F.2d at 721. Therefore, "the district court should have the first opportunity to rule on" the question. *Id.* at 722. We were dubious that the district judge would find that the verdict had been against the manifest weight of the evidence, because, we said, "the record, viewed from our comparatively remote vantage point, reveals no such imbalance. Nevertheless, we are reluctant to ignore the possibility that the district court perceived such an imbalance but declined to discuss it in the belief that Sterling's tied market power argument obviated the need to elaborate on these 'other things.' We will therefore remand the retrial order for clarification on this point." *Id.*

On remand, Judge Holderman stated the issue to be whether he "perceived that the jury's verdict, when assessed against the instructions that guided the jury's deliberations, was contrary to the manifest weight of the evidence." He concluded not, without elaboration, and entered judgment for P&E. Sterling appealed—that is the appeal decided today—contending that even with the issue of market power with respect to the tied product out of the case, the verdict was against "the manifest weight of the evidence," which is the accepted standard for ordering a new trial. This court refuses to consider the merits of the appeal, on the ground that our remand was for the sole purpose of obtaining clarification from Judge Holderman.

Our previous opinion is not clear, but, read as the present panel reads it, denies Sterling its right to appellate review of the order on remand refusing to grant a new

trial. For the previous panel never did decide whether the verdict was against the manifest weight of the evidence, though it offered a tentative view that it was not. The previous panel applied a very harsh standard of procedural default to deprive Sterling of its judgment n.o.v. The present panel construes the previous panel's opinion as adversely as possible to Sterling's right of appellate review of Judge Holderman's order on remand denying Sterling's motion for a new trial. The result of all this *strictissimus juris* is to uphold a jury verdict that is based on a cockeyed view of law and fact, resulting in a windfall for P&E that is both sizeable and undeserved.

A tie-in agreement does not violate the antitrust laws unless the seller has market power. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 17-18 (1984); *Will v. Comprehensive Accounting Corp.*, *supra*, 776 F.2d at 670-74; *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988); *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1345 (9th Cir. 1987); *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673 (6th Cir. 1986). Since Sterling sells only one-tenth of one percent of all industrial motors sold in the United States, it is a reasonable guess that it sells no more than one-tenth of one percent of the replacement parts for industrial motors. Industrial motors are not patented, and there is no evidence that Sterling motors are superior to those of competing manufacturers or fit a special niche in the market not served by competitors. The "physical uniqueness" of Sterling motors, of which P&E makes much, consists simply in the fact that replacement parts made for other motors won't fit Sterling motors, and vice versa.

One-tenth of one percent is no one's idea of market power, so P&E argues that Sterling has a monopoly of replacement parts *for Sterling motors*. This is true in the trivial sense that only Sterling manufactures parts usable in those motors. But it would be absurd to infer from this,

as the jury benightedly did, that Sterling has market power, that is, the power to raise the price of its parts above the price that a competitive market would charge, without losing so many sales as to make the price increase unprofitable. *Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986); *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 373 (7th Cir. 1986). This sort of argument is regularly rejected, see, e.g., *Grappone, Inc. v. Subaru of New England, Inc.*, *supra*, 858 F.2d at 797; *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 428-30 (D.C. Cir. 1986); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488-89 (5th Cir. 1984); *General Business Systems v. North American Philips Corp.*, 699 F.2d 965, 972-75 (9th Cir. 1983). Sterling could in principle exploit its "monopoly" by setting its price for replacement parts just below the point at which owners of Sterling motors would decide to scrap the motors rather than pay an exorbitant price for the parts necessary to keep them in service. But this would be a short-run game, since as soon as word got out no one would buy Sterling motors. As there is no evidence that Sterling ever played or contemplated playing this suicidal game, the jury's verdict cannot be upheld on this ground. Even if Sterling had played this game, the result would have been a brief perturbation in competitive conditions—not the sort of thing the antitrust laws do or should worry about. Cf. *International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 792 (2d Cir. 1987); *United States v. Waste Management, Inc.*, 743 F.2d 976, 982 (2d Cir. 1984).

The jury's verdict was against the manifest weight of the evidence on an essential element of the tie-in offense—that the seller have market power in the market for the tying product. In fact, the verdict was irrational, a distressingly frequent occurrence in complex commercial cases, where the issues are remote from the experience and understanding of jurors. So clear is the verdict's un-

reasonableness that we can order a new trial even though Judge Holderman, perhaps out of pique at our decision reversing him, refused to do so. See *Rascon v. Hardiman*, 803 F.2d 269, 273 (7th Cir. 1986). Sterling's procedural defaults denied Sterling the judgment n.o.v. that, as a matter of substantive justice, it richly deserved. There is no basis for denying it the new trial that it deserves even more clearly.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

AMENDED OPINION

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 86-1715

PARTS AND ELECTRIC MOTORS, INC.,
an Illinois Corporation,
Plaintiff-Appellant,
v.

STERLING ELECTRIC, INC.,
a Delaware Corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 83 C 2349—James F. Holderman, *Judge*

ARGUED NOVEMBER 4, 1986—DECIDED NOVEMBER 4, 1987

Before BAUER, *Chief Judge,* CUDAHY and RIPPLE, *Circuit Judges.*

CUDAHY, *Circuit Judge.* This is an antitrust case brought by Parts and Electric Motors, Inc. ("P & E") against Sterling Electric, Inc. ("Sterling"). P & E is a terminated distributor of Sterling brand electric motors and parts. P & E charges that Sterling violated Section I of the Sherman Act, 15 U.S.C. § 1, and Section III of

the Clayton Act, 15 U.S.C. § 14, by tying sales of its electric motors (the tied product) to sales of its replacement parts (the tying products). The jury delivered a verdict for P & E on its tying claim. The verdict was set aside in a post-trial order entering judgment n.o.v. and granting a new trial contingent on reversal of the judgment n.o.v. We reverse the judgment n.o.v. and remand the new trial order.

I.

Sterling, which is a wholly owned subsidiary of A.O. Smith Corp., manufactures various types of electric motors (also called "finished products") as well as replacement parts for them. Sterling concedes that its parts are unique and that it has 100% dominance in the market for Sterling replacement parts, which are usable only on Sterling finished products. No one else makes parts usable on Sterling finished products. From 1980 to 1984, Sterling's sales ranged between $9 million and $12 million annually. Sterling accounts for less than one percent of the market in which its finished products are sold.

P & E has been a Sterling distributor for a number of years but has always carried and continues to carry a number of other brands of electric motors and/or parts. In 1981 and 1982 P & E was the largest national distributor of Sterling parts. In terms of total purchases of Sterling electric motors P & E was third nationally in 1981 and seventeenth of seventy-seven in 1982, a year shortened by Sterling's termination of P & E's distributorship. P & E purchased $90,778 of Sterling electric motors in 1981 and $43,418 in 1982. Its corresponding purchases of parts were larger: $160,593 and $293,262, respectively.

When Sterling was acquired by A.O. Smith, there were over four hundred non-exclusive wholesale distributors of its products. Under its new management, Sterling instituted new distribution programs. Sterling contracted with ten "stocking" parts distributors, including P & E, and

a number of "referral" parts distributors. All of Sterling's distributors were non-exclusive. Stocking distributors were able to purchase at lower prices than referral distributors. In turn, Sterling required that each of its stocking parts distributors buy from it and aggressively promote minimum quantities of Sterling electric motors. Under its contractual arrangements with stocking distributors Sterling had the right to terminate the distributors for failure to take the agreed minimum quantities of finished products. Sterling thus conditioned its stocking distributors' right to purchase Sterling parts upon their purchase of Sterling motors.

In June and July of 1982, Sterling warned that if P & E did not purchase more Sterling finished products, P & E would risk termination of its relationship with Sterling, including the right to continue to buy parts. In response to these admonitions, P & E began steering customers toward Sterling electric motors even though P & E would have recommended other brands if its access to Sterling parts were not in jeopardy. P & E increased its purchases of Sterling motors in June and August 1982; nevertheless, on October 1, 1982, Sterling terminated P & E as a distributor of its electric motors and replacement parts because it regarded P & E's level of Sterling electric motor purchases as insufficient.

P & E then brought this lawsuit. It charges that Sterling's linking of mandatory finished product purchases, the tied product, to continued availability of Sterling parts, the tying product, constituted an illegal tying arrangement. At the jury trial P & E presented evidence with respect to the elements of a *per se* tying case as well as evidence in accord with an alternative rule of reason analysis. Sterling made three motions for directed verdict: one at the end of P & E's case, one at the end of its own case and one at the end of all the evidence. Sterling's first two directed verdict motions were substantially identical to the one it presented at the close of all the evidence, which stated in pertinent part:

> D. . . . Plaintiff has introduced no evidence to show that there was any effect in the tied market. There is no evidence in the record that plaintiff purchased any motors it did not desire to purchase or did not purchase any motors which it wished to have purchased.
>
> E. . . . In this case, Defendant's activity in restructuring its distribution network was pro-competitive and caused no antitrust injury.
>
> F. . . . The evidence produced by Plaintiff shows only a manufacturer with a miniscule market share seeking to improve the competitive position of its product in the market place which is economically beneficial to customers.

Defendant's Motion for Directed Verdict at the Conclusion of All the Evidence, R. 78 at 3.

As further discussion will disclose, none of Sterling's motions appears to have asserted that P & E was required to prove the likelihood or danger of Sterling's obtaining market power in the market for the tied product (Sterling electric motors or finished products) as an element of the tying violation.

At the instruction conference, the district court adopted an Instruction 28a which stated in part:

> Market power with respect to the tied product, which is electric motors, is not relevant.

Tr. at 955. The remainder of the instruction described the criteria the jury should apply to determine the existence of market power in the tying product market. Sterling's only objection to Instruction 28a was as follows:

> Defendant objects to Court's 28a in that it's an improper definition of market power since it contains no consideration of profit.

Tr. at 925.

The district court relied on this objection as preserving Sterling's point that a threat of market power in the tied product was an essential ingredient of a tying violation. The district court asserted that the reference to "profit" meant power over price and that this in turn was a reference to market power in the tied product (electric motors).

Sterling's objection to the district court's Instruction 28a came after its own instruction corresponding to 28a, Sterling's proffered Instruction 42a, was rejected by the district court. That instruction stated in pertinent part as follows:

> In order to establish the existence of . . . an illegal tying agreement, the burden is upon the Plaintiff to prove each of the following elements by a preponderance of the evidence:
>
> . . . .
>
> The Second element that the Plaintiff must prove is that the "tying" product has sufficient economic power or significant market leverage in the market for replacement parts for electric motors to appreciably restrain or foreclose free competition in the market for the "tied" product.
>
> . . . .
>
> The Third element that the Plaintiff must prove in support of its anti-trust claim is that the alleged tying arrangement involved a "not insubstantial amount of commerce." In deciding this question you must look to the total dollar volume of sales in interstate commerce by the Defendant to the Plaintiff of the products, if any, which you find to have been tied to the alleged "tying" product. For your guidance in this respect, the Supreme Court of the United States has found that annual sales of almost $200,000 are not insubstantial.
>
> . . . .

Sterling's Proposed Jury Instruction 42(a), R. 146 at 2-4.

In addition, the court gave an Instruction 32a, which permitted a verdict on the "rule of reason" without proof of market power in any market, to which Sterling offered no objection.[1]

Further, Sterling tendered, and the court gave, six special interrogatories. These required the jury to determine whether or not P & E had proven each of five contested elements of a *per se* case. In addition, Special Interrogatory No. 6 inquired of the jury whether Sterling's conduct constituted an unreasonable restraint of trade. The jury answered each of the six special interrogatories in favor of P & E and found Sterling liable. It subsequently determined damages to be $1,231,992, which amount was trebled to $3,695,976.

Sterling filed a motion in the alternative for judgment notwithstanding the verdict or for a new trial. In its post-trial motion, Sterling contended, among other things, that "[e]ven if the Sterling distribution program were a tying arrangement, plaintiff has failed to demonstrate the requisite anticompetitive impact on the relevant market." Sterling Motion for N.O.V. or New Trial, R. 107 at 3.

The district court granted Sterling's motion for judgment n.o.v. and ordered a new trial conditionally upon reversal or vacatur of the judgment n.o.v. The district court held that P & E was required, but had failed, to prove a substantial danger that "[Sterling]" will acquire market power in the tied product [electric motor] market." In this regard, the district court relied upon *Will*

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[1] Instruction 32a read in pertinent part as follows:

> If you find that plaintiff has failed to prove either of the following elements, the second element of market power or the fourth element of forcing, but has proven the other elements of separate products, linking of sales, and some injury to plaintiff's business, you must then evaluate the reasonableness of defendant's conduct.

Tr. at 957-58.

v. Comprehensive Accounting Corp., 776 F.2d 665, 674 (7th Cir. 1985) (quoting *Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Dev. Co.*, 758 F.2d 203, 210 (7th Cir. 1985)), *cert. denied*, 106 S. Ct. 1659 (1986). The *Will* opinion was issued on October 28, 1985—more than a month after the verdict was returned and the judgment entered in this case and after the motion for judgment n.o.v. or for a new trial was filed.

P & E appeals from the grant of the motion for judgment n.o.v. and from the conditional grant of a new trial.

II.

There are essentially two issues before us in this appeal. The first is whether the district court was correct in its construction of *Will* and *Carl Sandburg Village*, cases which it relied upon for its conclusion that liability under a tying arrangement is predicated in part upon a showing that there is a substantial danger that the tying seller will acquire market power in the tied product market. The second issue is whether the point relating to market power in the tied product market was properly raised and preserved by Sterling in its motions for a directed verdict or in the position it took with respect to jury instructions. If the point was not properly raised and preserved, it is not necessary for us to determine whether *Will* and *Carl Sandburg Village* were properly construed by the district court. As a final matter, we must consider whether alternative grounds support the district court's post-trial order.

To preserve the issue of market power in the new motor market for judgment n.o.v. purposes, Sterling would have had to identify the point distinctly and specifically in a motion for directed verdict. In *Johnson v. University of Wisconsin-Milwaukee*, 783 F.2d 59 (7th Cir. 1986), we stated:

> Although we have on occasion excused the lack of a formal motion for a directed verdict at the close of all the evidence [as required by Fed. R. Civ. P. 50(a)] where the moving party did move for a directed verdict earlier in the trial and the opposite party was not prejudiced by the moving party's failure to renew the motion, plaintiffs' failure to make a motion for directed verdict at any point in the trial cannot be excused.

Id. at 61; *see also Benson v. Allphin*, 786 F.2d 268, 272-75 (7th Cir.), *cert. denied*, 107 S. Ct. 172 (1986) (failure to renew motion for directed verdict at the conclusion of the evidence excused where neither Seventh Amendment problems nor prejudice to opposing litigant would result). Moreover, Rule 50(a) of the Federal Rules of Civil Procedure requires that "[a] motion for directed verdict . . . state the *specific* grounds therefor." (Emphasis supplied.) A party that fails to state its objection to jury instructions specifically cannot challenge the jury's verdict on that issue. *Kinzenbaw v. Deere & Co.*, 741 F.2d 383, 387-88 (Fed. Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985). It seems clear to us that the district court erred in holding that the point had been properly raised and preserved in this case. Sterling argues that paragraphs "D," "E," and "F" (quoted *supra*) of its Motion for Directed Verdict at the Close of All the Evidence raised P & E's failure to prove that Sterling exercised power over price in the new motor market. We cannot agree. These three paragraphs do not seem to us to mention the issue of market power in the tied product let alone preserve it. The phrase "effect in the tied market" ("D") suggests an impact on the volume of business and does not raise an issue of market power. Similarly, mere mention of the terms "pro-competitive" ("E") and "miniscule market share" ("F") is not sufficiently specific to raise an issue of market power in the tied product market. The requirement that the directed verdict motion

raise each contested issue in specific terms before the case is submitted to a jury affords the nonmoving party an opportunity to repair the deficiencies in its case. *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1388-89 (7th Cir. 1984); *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 814 (3d Cir. 1984), *cert. denied*, 106 S. Ct. 3284 (1986).[2]

Sterling's request for jury instructions also failed to preserve its position for judgment n.o.v. purposes. Even if this court were prepared to equate objections to jury instructions with motions for directed verdict in this context, despite the contrary requirements of Rule 50(b), we do not believe that Sterling presented its tied market power argument in its objections to the jury instructions. Sterling contends that it was prejudiced by Instruction 28a, "which contained the confusing language regarding the relevancy of market power in the tied product and which actually related only to the jury's determination of market power in the tying product." Appellee's Brief at 16.[3] But at trial Sterling did not object to the statement that "[m]arket power [in the tied product] is not rele-

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[2] Even Sterling's motion for judgment n.o.v. or a new trial did not specifically state that P & E was required to prove the likelihood or danger of Sterling's obtaining market power in the market for electric motors as an element of the tying offense. Sterling points to the statement in its motion that "plaintiff has failed to demonstrate the requisite anti-competitive impact on the relevant market." We agree with P & E that "requisite impact" appears to invoke a dollar volume standard and not to implicate market power.

[3] Sterling disputes P & E's suggestion that Sterling's failure to object to the tied product market power issue meant that Sterling agreed that the issue was irrelevant to the case as a whole. Rather, Sterling argues that, by failing to object, it only agreed that the issue of market power in the tied product was irrelevant to the question whether or not Sterling possessed market power to the *tying* product. Nothing in the record, however, lends clear support to Sterling's position on this point.

vant." The only objection that Sterling made to Instruction 28a was as follows:

> Defendant objects to Court's 28a in that it's an improper definition of market power since it contains no consideration of profit.

Tr. at 925. Sterling's argument that "consideration of profit" in some unspecified market or markets necessarily raised the issue of market power in the tied product market is incorrect. In fact the original instruction proposed by Sterling as an alternative to Instruction 28a (Instruction 42a) did not contain any suggestion that tied product market power was relevant. Instruction 42a merely required that the leverage in the market for the tying product be sufficient to "appreciably restrain" competition in the tied product market. Further, as noted, Sterling did not object to the court's Instruction 32a, which permitted a verdict on the rule of reason without proof of market power in any market. In his closing argument, counsel for Sterling enumerated the elements of the cause of action without suggesting that tied product market power was a part of the case.

Thus, it seems to us that Sterling neither proffered an instruction of its own that would have made the threat of market power in the tied product market an element of a tying case nor objected to the failure of the court's instructions to include such a requirement. Accordingly, we agree with P & E that even if a substantial threat of market power in the tied product market is an essential element of a tying case, this point was not raised and preserved in the trial court for purposes of the judgment n.o.v.[4] In light of the fact that the *Will* opinion was not

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[4] The district court believed, however, that even if Sterling had not preserved its objection to Instruction 28a, the court was still permitted under Fed. R. Civ. P. 50(b) to grant Sterling's motion for judgment n.o.v. Relying on *Dual Manufacturing & Engineering, Inc., v. Burris Industries, Inc.*, 619 F.2d 660 (7th Cir.) (en

issued until after the verdict had been rendered and the post-trial motions made in the case before us, this is perhaps not surprising.

Sterling also waived its opportunity to argue for a new trial based on its lack of market power in the new motor market. Motions for a new trial are ordinarily "confined almost entirely to the exercise of discretion on the part of the district court." *Allied Chem. Corp. v. Daflon, Inc.*, 449 U.S. 33, 36 (1980). This court will overturn the approval or denial of a retrial motion only if it identifies a " 'clear abuse of discretion' " on the part of the district court. *General Foam Fabricators, Inc. v. Tenneco Chem., Inc.*, 695 F.2d 281 (7th Cir. 1982) (quoting *Stinebower v. Scalia*, 331 F.2d 366, 367 (7th Cir. 1964)). Here, however, the district court conditionally granted the new trial based on a legal theory that Sterling had failed to raise at trial. Even if Sterling should be correct in its current view of the tied market power issue, it cannot obtain a new trial based on a legal issue that it failed to raise at trial. "When a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of

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banc), *cert. denied*, 449 U.S. 870 (1980), the district court found that in reviewing its denial of Sterling's directed verdict motion in connection with the judgment n.o.v., it was governed by the law properly applicable to the case, rather than what the court had asserted the law to be in its instructions. Once again, we are not required to pass upon the district court's interpretation of the substantive law in order to address this point. The conclusion in *Dual Manufacturing & Engineering* about what law controls a judgment n.o.v. takes as its premise that "[a] proper motion for directed verdict" has been made. 619 F.2d at 663 (quoting *Coca Cola Bottling Co. v. Hubbard*, 203 F.2d 859, 862 (8th Cir. 1953)); *see also Johnson v. University of Wisconsin-Milwaukee*, 783 F.2d at 61 (requiring statement of objection in motion for directed verdict). In light of our holding that Sterling's directed verdict motion was inadequate in that it did not raise the tied product market power issue for later determination, Fed. R. Civ. P. 50(b), *Dual Manufacturing & Engineering* is not relevant to this appeal.

the charge was correct, he may not, through a general exception, obtain a new trial." *Palmer v. Hoffman*, 318 U.S. 109, 111 (1943). The federal rules also speak to this point: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51. We have already discussed the lack of specificity in Sterling's references to its "miniscule market share," its "effects on the tied market," and the "pro-competitive" effects of its tying requirement, and in its objection to the failure of the jury instruction to encourage "consideration of profit." These statements are too vague to reserve the market power issue for purposes of the new trial motion just as they were insufficiently specific to reserve the same arguments for purposes of the judgment n.o.v.

We have recognized an extremely limited exception to this rule and ordered a new trial on grounds not properly preserved where a "series" of plainly erroneous instructions "seriously affected the fairness of the proceeding." *Iskander v. Village of Forest Park*, 690 F.2d 126, 130 (7th Cir. 1982). This exception, however, applies only in "extraordinary" circumstances involving manifest error and compelling equities. *Davis v. Consolidated Rail Corp.*, 788 F.2d 1260, 1267-68 (7th Cir. 1986); *Exxon Corp. v. Exxene Corp.*, 696 F.2d 544, 548-49 (7th Cir. 1982). The district court's failure to instruct the jury that market power in the new motor market was an essential element of the claim against Sterling was not plain error; and we do not believe that it is unfair to Sterling to require it to live with the theory it presented at trial. To the extent that the district court's conditional grant of the new trial relied on the tied market power argument, therefore, it must be reversed.

Accordingly, since Sterling failed to raise or preserve the issue, we need not construe *Will* with respect to the requirement of threatened market power in the tied product. The key statement in *Will*, 776 F.2d at 674, appears to be dictum since the *Will* court had already disposed of the appeal by ruling that the plaintiff had failed to prove market power in the tying market. *Id.* at 671. The authority of the *Will* dictum in this circuit may be substantial nonetheless. We note, however, that both *Will* and *Carl Sandburg Village*, on which *Will* relies, are controlled by *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984). In *Hyde*, Justice Stevens' majority opinion, in which four other Justices concurred, re-endorses the application of traditional *per se* principles in tying cases.[5] The majority appears to require only that market power in the tying product be "used to impair competition on the merits in another market," 466 U.S. at 14, and that "a substantial volume of commerce [be] foreclosed thereby." *Id.* at 16. Justice Stevens quotes with approval from Justice White's dissenting opinion in *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495 (1969):

> The tying seller may be working toward a monopoly position in the tied product and, *even if he is not*, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market.

466 U.S. at 13 n.19 (quoting *Fortner*, 394 U.S. at 513 (White, J., dissenting)) (emphasis supplied). Justice Stevens, therefore, in *Hyde* does not articulate as a prerequisite to a tying violation that there be a substantial

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[5] "It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'" 466 U.S. at 9. *Cf. Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 702 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

danger that the tying seller will acquire market power in the tied product market. Nonetheless, Justice Stevens does not expressly address the question and it may not be clear what scope, if any, is left to the lower courts to develop the issue. It must be conceded, however, that the Stevens opinion does not seem to suggest any role for the threat of market power in the tied product market as a factor in the analysis.

On the other hand, Justice O'Connor, in a concurring opinion joined by three other Justices, advocates in *Hyde* that *per se* principles of liability be abandoned and that all tying arrangements be analyzed under the rule of reason. 466 U.S. at 33-35. She contends that to establish a tying violation "there must be a substantial threat that the tying seller will acquire market power in the tied-product market." 466 U.S. at 38. Justice O'Connor's position is based upon the proposition that "[t]he existence of a tied product normally does not increase the profit that the seller with market power can extract from sales of the *tying* product." 466 U.S. at 36. There is a debate among both judges and scholars concerning the effects of tying arrangements. On the judicial debate, see 466 U.S. at 33-35 (O'Connor, J., concurring). On the scholarly debate, compare Bowman, *Tying Arrangements and the Leverage Problem*, 57 Yale L.J. 19, 21 (1957) and R. Bork, *The Antitrust Paradox* 372-75 (1978) with Kaplow, *Extension of Monopoly Power Through Leverage*, 85 Colum. L. Rev. 515 (1985) and Strasser, *An Antitrust Policy For Tying Arrangements*, 34 Emory L.J. 253 (1985). But notwithstanding this debate, the requirement that there be a threat of market power in the tied product has not been endorsed as a requisite for a tying violation by a Supreme Court majority. In any event, whatever the law may be or ought to become, in this case the question is moot since the issue of threatened market power in the tied product market was waived at trial by Sterling.

III.

Our finding that Sterling waived its arguments concerning market power in the tied product market leads us to consider other grounds upon which we might affirm the judgment n.o.v. and the conditional grant of a new trial. Although the district court's post-trial order focused exclusively on Sterling's lack of market power in the new motor market[6] we will examine Sterling's alternative argument to determine whether any alternative basis for the post-trial relief exists. *Cf. Miller v. Gateway Transp. Co.*, 616 F.2d 272, 275 (7th Cir. 1980) (summary judgment may be affirmed on grounds supported in record even if not relied upon by lower court). Sterling first urges that its distribution program should not have been subjected to tie-in analysis at all. Rather, Sterling claims that the program was merely an effort to obtain vigorous representation of its full line of products. Vertical restraints were purportedly imposed to enhance Sterling's competitiveness and to eliminate "free rider" problems. This is an argument of considerable potential merit that will be explored below.

Even if its conduct is subjected to a tie-in analysis, Sterling argues: (1) P & E failed to prove the existence of two separate products; (2) there was no proof of market power in the tying product market; (3) there was no proof of any foreclosure of competition in the tied product market; and (4) there was no proof of a threat to acquire market power in the tied product market.

As we have already discussed at length, Sterling has waived its tied-product market power argument. The

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[6] The district court's April 14, 1986 post-trial order does not discuss Sterling's alternative arguments. The only language that even remotely suggests consideration of these arguments is a reference to "other things" (apart from the issue of market power in the new motor market) that should have kept P & E's claim from the jury. No. 83 C 2349, mem. op. at 4 (N.D. Ill. Apr. 14, 1986).

remaining contentions must be considered separately as potential support for the judgment n.o.v. and for the conditional retrial order. As potential support for the judgment n.o.v., Sterling's alternative arguments encounter two problems. First, the standard of review presents Sterling with a difficult obstacle. There must be such a failure of evidence that "reasonable men in a fair and impartial exercise of their judgment" could not have reached the same conclusion as the jury. *Freeman v. Franzen*, 695 F.2d 485, 488 (7th Cir. 1982), *cert. denied sub nom. Branche v. Freeman*, 463 U.S. 1214 (1983); *Konczak v. Tyrrell*, 603 F.2d 13, 15 (7th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980). Second, the jury answered special interrogatories which appear to specifically address Sterling's other arguments.

We turn first to the remaining three of Sterling's four arguments that assume a tie-in analysis. Regarding the first, the jury specifically decided that Sterling's parts and electric motors were two separate and distinct products with separate markets. Special Interrogatory No. 1. Regarding the second, the jury specifically found that Sterling "possessed the ability to use dominance over the supply of Sterling replacement parts or [sic] force others to buy . . . other products." Special Interrogatory No. 2. "Market power" is described in *Hyde* as the special ability of a seller to force a purchaser to do something he would not do in a competitive market. 466 U.S. at 13-14. Thus, the jury's verdict on Special Interrogatory No. 2 equals a finding of market power in the tying product. With reference to Sterling's third contention, a combination of the answers to Special Interrogatories 1-5 amounts to a finding of foreclosure of competition in the tied product market. The jury also found specifically that Sterling's conduct was an unreasonable restraint on trade. Special Interrogatory No. 6.

In reviewing the district court's grant of judgment n.o.v., we must reverse if the record contains evidence that supports the jury's verdict.

> Jury factfinding, unlike judicial factfinding, is not subject to direct attack as "clearly erroneous." In view of the Seventh Amendment's prohibition . . . a jury verdict can only be set aside if the "evidence [viewed] in the light most favorable to the plaintiff and . . . [the] facts and inferences reasonably drawn from the facts . . . lead to but one conclusion—that there is a total failure of evidence to prove the plaintiff's case."

Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 319 (7th Cir. 1982) (citations omitted), *rev'd on other grounds*, 467 U.S. 752 (1984). Under this standard, we believe there is ample evidence in the record to support the jury verdicts, which include the answers to the special interrogatories.

On the separate products issue, P & E presented evidence of differences in the distribution channels, mark-up, margins, industry treatment and sources of demand for electric motors and repair parts. *Cf. Hyde*, 466 U.S. at 19-21 ("[T]he answer to the question whether one or two products are involved turns . . . on the character of the demand for the two products." *Id.* at 19). Even functionally related products, one of which is useless without the other, have been held to be the subject of illegal tying arrangements. *Id.* Repair parts and finished goods have been expressly held to be separate products capable of being tied. *See Mozart Co. v. Mercedes-Benz of North America*, 593 F. Supp. 1506, 1514-15 (N.D. Cal. 1984); *Grappone, Inc. v. Subaru of New England*, 534 F. Supp. 1282, 1289 (D.N.H. 1982) (passenger cars and replacement parts held to be separate products).

Similarly, on the issue of market power in the tying product, Sterling conceded at trial that it has 100% dominance in the market for Sterling parts and that Sterling parts are unique. Tr. at 315-16. When the sell-

er's share of the market is high, or when the seller offers a unique product that competitors are not able to offer, the likelihood is that market power exists. *Hyde*, 466 U.S. at 17.[7]

Additional evidence substantiated Sterling's market power. In addition to testimony from P & E's expert witness directly on point, there was evidence that no alternative sources existed for Sterling parts; that no one but Sterling manufactured parts compatible with Sterling motors; and that there are effective economic barriers to entry into the market for parts compatible with Sterling motors since the demand for Sterling parts will accommodate only one manufacturer. In addition, P & E adduced evidence that showed that there was general acceptance of the tie among Sterling distributors. The existence of several tying arrangements provides significant evidence of a defendant's power to restrain free competition. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 7-8 (1958).

As to foreclosure of competition in the market for the tied product, the jury's findings were twofold: Sterling's conduct was a *per se* violation of antitrust tying law, and it also was an unreasonable restraint of trade. Of course, in a *per se* case, injury to competition is in principle conclusively presumed and need not be proved. *Hyde*, 446 U.S. at 9-10. As we have recognized, there

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[7] The Supreme Court's characterization of "market power," *see Hyde*, 466 U.S. at 13-14, has been alternatively stated in this circuit as "power over price," or the ability to induce buyers to pay more money by cutting back the supply of goods available for purchase. *Will*, 776 F.2d at 671. The best way to show power over price is to establish directly that the price of the tied package is higher than the price of components sold in competitive markets. *Id.* at 671-72. However, in the absence of direct evidence to this effect, a plaintiff may demonstrate market share or uniqueness as proxies for power over price. *Id.* at 673; *see also Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611-13 (1953) (on market dominance); *Fortner*, 394 U.S. at 504-05 (on tying).

are those who suggest that tying arrangements should not be subject to *per se* analysis, but rather should be evaluated always in light of actual competitive consequences. *See, e.g.*, Dam, Fortner Enterprises v. United States Steel: *Neither a Borrower, Nor a Lender Be*, 1969 Sup. Ct. Rev. 1, 19; R. Bork, *supra* p. 14, at 375-81; *see also Hyde*, 466 U.S. at 21 n.34 ("[I]n a sense the question whether this case involves 'tying' is beside the point. . . . If the competitive consequences of this arrangement are not those to which the *per se* rule is addressed, then it should not be condemned irrespective of its label.").

We need not decide whether Sterling's scheme was *per se* illegal, because the jury concluded that Sterling's distribution arrangement unreasonably restrained competition. Viewing this as a rule of reason case only, substantial evidence supports the jury's special verdicts.

Sterling claims that the program it instituted was a permissible vertical distribution arrangement, designed to achieve the legitimate end of enhancing its competitiveness by deterring "free riding." Sterling argued this theory to the jury on several occasions, *e.g.*, Tr. at 885-904, but the jury nevertheless concluded that Sterling's conduct was an unreasonable restraint of trade. Sterling characterized its program as entirely rational and benign:

> All that Sterling insisted was that, in exchange for the substantial discounts it was receiving, P & E bear its share of developing the motor market on which Sterling's replacement parts business is entirely dependent.

Appellee's Brief at 8. However, the jury concluded that Sterling's actions were unreasonable, and this conclusion is supported by record evidence. The trial testimony permits a conclusion that P & E was not a free rider at all —P & E had voluntarily carried Sterling motors for four years before the tie-in was proposed, and P & E placed

third nationally among Sterling distributors for its sales of motors in 1981 and was in the top quarter in 1982, a year shortened by P & E's termination. P & E apparently promoted the Sterling line in its mailings to customers and stressed to its sales force to "keep pushing" Sterling products. Such behavior by P & E certainly is rational, inasmuch as its sales of Sterling parts could only be helped if it also sold new Sterling motors to its customers. If Sterling's vertical distribution program is judged only by its competitive consequences, as Sterling argues, there is evidence that Sterling's distributors were forced after the tie-in to increase their purchases of Sterling's motors by more than $250,000, presumably at the expense of Sterling's competitors, and testimony that P & E employees engaged in customer "steering," that is, in diverting customers to Sterling motors over other brands. The effect of Sterling's tie-in could reasonably be perceived by the jury as giving a competitive edge to Sterling products based not on their merits, but on Sterling's tie. Certainly a jury might have concluded the distribution program was reasonable but that case is not before us.

The cases cited by Sterling to justify its distribution arrangements are not persuasive. *See Pitchford v. Pepi, Inc.*, 531 F.2d 92 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976); *David R. McGeorge Car Co. v. Leyland Motor Sales*, 504 F.2d 52 (4th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975). Neither case apparently involved a defendant who used market power in the "tying" product to affect a second market. In addition, *Pitchford* involved the tie-in of only a single unit of the tied product, as a sample. In *David R. McGeorge* the distributor was terminated for refusing to carry one product line at all, not for deficient sales of that line.

We believe, in sum, that the contention that the arrangements between P & E and Sterling were a legitimate implementation of Sterling's distribution strategy has some force, but the jury rejected it, and there is ade-

quate evidence to support the jury's verdict against a motion for judgment n.o.v.

We turn now to the question whether Sterling's arguments about the elements of the case might provide alternative grounds for the district court's conditional grant of a new trial. This court, as we have indicated, ordinarily accords great deference to a district court's approval or denial of a new trial motion. Reluctance to second-guess the trial court's decision on a motion for retrial should be especially strong with respect to decisions based on the trial court's assessment of the weight of the evidence. *Compare General Foam*, 695 F.2d at 288 (reversing judgment n.o.v. but upholding determination that jury verdict "was against the clear weight of the evidence") *with Eulo v. Deval Aerodynamics, Inc.*, 430 F.2d 325 (3rd Cir. 1970), *cert. denied*, 401 U.S. 974 (1971) (reversing district court's decision to grant new trial for supposed errors in jury instructions). While the record contains too much support for P & E's claims to justify a judgment n.o.v., we are not now in a position to say that P & E's proof was too strong for the district court to have concluded that the manifest weight of the evidence favored Sterling.

In this case, it is true, the district court has not stated that the jury's verdict was contrary to the weight of the evidence when assessed against the instructions that guided the jury's deliberations. Moreover, the record, viewed from our comparatively remote vantage point, reveals no such imbalance. Nevertheless, we are reluctant to ignore the possibility that the district court perceived such an imbalance but declined to discuss it in the belief that Sterling's tied market power argument obviated the need to elaborate on these "other things." We will therefore remand the retrial order for clarification on this point. If the conditional retrial order rested solely on the stated grounds, judgment will be entered for P & E. If, on the other hand, the district court also believed,

based on some previously unstated but substantial and defensible grounds, that the manifest weight of the evidence favored Sterling when assessed against the instructions under which the jury deliberated, then the court may proceed with the new trial.

We recognize the economic and philosophic debate in antitrust circles about tying arrangements. *See* P. Areeda, *Antitrust Analysis* 734-808 (3d ed. 1981). The requirement of a substantial threat of market power in the tied product market (a condition unlikely to be met in a great many tie-in situations) reflects a point of view that tying is less injurious to consumer welfare and more supportive of legitimate economic ends than traditional legal analysis suggests. Here, of course, Sterling waived its right to argue that threatened market power in the tied product market is an essential element of a tying violation. The case went to the jury under instructions to which Sterling made no sufficient objection. The jury decided liability, including six special verdicts in favor of P & E. There was sufficient evidence to support the verdicts in the face of Sterling's motion for judgment n.o.v., although there may possibly not have been sufficient evidence to preclude the district court from finding that the verdict in favor of P & E was against the manifest weight of the evidence. At least, the district court should have the first opportunity to rule on the latter question. For these reasons, the judgment n.o.v. is reversed and the judgment conditionally granting a retrial is vacated and remanded for further proceedings not inconsistent with this opinion.

REVERSED IN PART,
VACATED IN PART
AND REMANDED.

A true Copy:
Teste:

. . . . . .
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 2349

PARTS AND ELECTRIC MOTORS, INC.,
an Illinois corporation,
Plaintiff, Counterdefendant,

v.

STERLING ELECTRIC, INC.,
a Delaware corporation,
Defendant, Counterplaintiff.

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Plaintiff, Parts and Electric Motors, Inc. ("P&E"), in its complaint sought treble damages under the antitrust laws against defendant, Sterling Electric, Inc. ("Sterling"), for allegedly illegally tying the purchase of Sterling motor replacement parts to the purchase of Sterling electric motors. P&E also sought damages for an alleged breach of contract. Sterling counterclaimed for damages for an alleged breach of contract.

This case was tried to a jury which returned a verdict for P&E on its antitrust claims and assessed actual damages in the sum of $1,231,992.00. (O.R. 100). That sum was trebled to $3,695,976.00. (O.R. 103). The jury also returned a verdict for P&E on its breach of contract

claim in the amount of $13,690.54 (O.R. 101) and a verdict for Sterling on its counterclaim in the amount of $37,196.94. (O.R. 102). The jury's verdict on the breach of contract claims is not contested in the parties' respective post-trial filings which focused solely on the antitrust issues.

P&E is and has been a distributor of both electric motors and replacement parts for a number of years. One of the numerous lines of electric motors and replacement parts which P&E has distributed over the years has been Sterling's.

Sterling manufactures electric, single-speed motors, electric gear motors and electric variable speed motors and, of course, replacement parts for those motors. In May 1980, Sterling, which had previously been owned by Lionel Corporation, was purchased by A.O. Smith Corporation. When Sterling was acquired by A. O. Smith, there were over 400 non-exclusive wholesale distributors of its products. Those distributors sold Sterling's competitor's products as well as Sterling's. One of those distributors was P&E.

Beginning in late 1981 and continuing into early 1982, Sterling's new management began to put new distribution programs into place for the purpose of ensuring that Sterling's finished products would be promoted more actively.

Under Sterling's prior marketing program its distributors had no particular incentive to promote Sterling's finished products. Sterling's new management became concerned in 1981 that without an increased marketing effort for Sterling finished products, Sterling's long-term vitality was jeopardized for both finished products and replacement parts because as Mr. Kennard, a former Regional Sales Manager at Sterling explained:

> If you can't sell a new product, the parts business evaporates. (Tr. 285).

As part of its new distribution programs, Sterling contracted with 10 "stocking" parts distributors, including P&E, and a number of "referral" parts distributors. (Tr. 253, 629-31). Stocking distributors were able to purchase at lower prices than referral distributors. In turn, stocking distributors had various contractual obligations to Sterling, including a requirement that they maintain an effective outside sales force and promote Sterling's products. (Tr. 682). All of Sterling's distributors, both stocking and referral, were and continue to be non-exclusive.

P&E agreed to participate in several Sterling programs as a stocking distributor. Under the programs P&E committed to purchase and aggressively promote minimum quantities of Sterling's motors. Subsequently, P&E failed to purchase the agreed minimum quantities and failed to provide and maintain an active furnished goods outside sales force. (Tr. 277). Sterling felt that P&E, by taking the price discounts of a stocking distributor without making the required sales effort to sell new motors, was taking a "free ride" on the other stocking distributors who were living up to their obligations. (Tr. 284). Pursuant to its contractual rights, Sterling in 1982 terminated P&E as a stocking distributor. (Tr. 120).

The antitrust question presented by this case is whether Sterling's distribution program, as it was effectuated with P&E by Sterling, constituted illegal tying—with Sterling replacement parts as the tying product and Sterling finished goods as the tied product—in violation of the antitrust laws.

The Court has taken substantial time to evaluate thoroughly the parties' respective positions. However, pursuant to Fed. R. Civ. P. 50(b), the judgment entered upon the jury's verdict for the plaintiff must be set aside and judgment entered in accordance with Sterling's motion for directed verdict at the close of all the evidence

(O.R. 78) which the Court took under advisement. (Tr. 835). After reviewing the applicable law, the Court firmly believes that this case should not have been submitted to the jury because, among other things, the evidence clearly shows that P&E failed to satisfy the threshold criterion "that there is a substantial danger that the tying seller [Sterling] will acquire market power in the tied product [electrict motors] market." *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 674 (7th Cir. 1985) quoting *Carl Sandburg Village Condominium Association No. 1 v. First Condominum Development Co.*, 758 F.2d 203, 210 (7th Cir. 1985).

From 1980 to 1984, Sterling sales have ranged between $9 and $12 million annually. (Tr. 273-74). The evidence from plaintiff's expert witness, Dr. Gary R. Skoog, was that Sterling had less than one percent of the finished goods market for electric motors. (Tr. 520-21). A seller with such a miniscule market share in the tied product market cannot be found to pose a "substantial danger" of acquiring market power in the tied product market. Sterling is no more than a pygmy in the electric motor market. It has numerous competitors.

P&E argues, as it did during the trial, that "Market power is necessary only in the *tying* product"—Sterling replacement parts. (P&E's Memorandum in Opposition to Sterling's Motion for Judgment Notwithstanding the Verdict or for a New Trial, p. 8) ("P&E's Mem. in Opp."). P&E's argument is erroneous.

The Seventh Circuit reaffirmed in *Will*, *supra* at 674, the basic antitrust principle articulated in *Carl Sandburg Condominium Assoc.*, *supra*, at 210, that:

> In monitoring the use of tie-ins, the goal of the antitrust laws in the tying context is to prevent the economically harmful effects of tie-ins in cases where a seller's power in the market for the tying product is used to create additional power in the market for

> the tied product. *Jefferson Parish Hospital District No. 2 v. Hyde*, —— U.S. ——, 104 S.Ct. 1551, 1571, 80 L.Ed.2d 2 (1984) (O'Connor, J., concurring, joined by Burger, C.J., Powell, J., and Rehnquist, J.). One of the threshold criteria that a plaintiff must satisfy under both the *per se* and rule of reason analyses in order to show that such an extension of the seller's market power may pose a threat of economic harm and an unlawful restraint of trade is that there is a substantial danger that the tying seller will acquire market power in the tied product market. *Id.* at 1571-72.

P&E relies on the *Will* opinion to assert that Sterling cannot raise in post-trial argument P&E's failure to make the requisite "substantial danger" showing because Sterling failed to resist or object "in any manner whatsoever" to a jury instruction which stated that "market power with respect to the tied product . . . is not relevant." (P&E's Supplementary Memorandum in Opposition to Sterling's Motion for Judgment N.O.V. or New Trial, p. 5).

Sterling, however, did object to the instruction—Court's Instruction 28a—which contained that language. Defense counsel stated: "Defendant objects to Court's 28a in that it's an improper definition of market power since it contains no consideration of profit." (Tr. 925).

Fed. R. Civ. P. 51 states:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give

> an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Although Sterling's counsel could have been more precise with regard to his objection to Instruction 28a because of the error in that instruction the Court deems defense counsel's objection to be sufficient, especially in light of Sterling's Instruction 42a which was tendered and refused by the Court. (Tr. 929).

Plaintiff's reliance on *Will* to support its argument that defendant is precluded from now asserting the failure of plaintiff's evidence, moreover, is misplaced. In *Will* the Seventh Circuit, in holding for the defendant on the plaintiffs' antitrust tying claims, stated:

> We have bypassed the challenges to the jury instructions on the antitrust issues because, in light of their failure to show market power, the plaintiffs had no case.

Will, *supra* at 674.

Consequently, in *Will* it is clear that the nature of the jury instruction challenges were of no moment in determining plaintiff's failure of proof as to the market power issue.

Moreover, the passages from Judge Easterbrook's opinion in *Will* which P&E has selectively quoted in its initial memorandum mischaracterize what Judge Easterbrook meant. (P&E's Mem. in Opp., p. 3). In the part of the *Will* opinion upon which P&E has relied, Judge Easterbrook was addressing the failure of the defendant to request or tender an instruction limiting the kinds of damages which the jury could find, not the law governing the proof required to make a *prima facie* case upon which a motion for directed verdict under Fed. R. Civ. P. 50(a)

or a motion for judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b) is to be based.

In sum, P&E's reliance on *Will* for support that Sterling in the jury instruction conference waived its opportunity to have the Court consider the failure of P&E's proof as to Sterling's lack of market power in the tied product market is without merit.

Even if defense counsel had not preserved his objection to the error in Instruction 28a, this Court is not foreclosed from granting defendant's motion for judgment n.o.v. The first sentence of Fed. R. Civ. P. 50(b) states:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.

As the Seventh Circuit in *Dual Manufacturing & Engineering, Inc. v. Burris Industries, Inc.*, 619 F.2d 660, 663 (7th Cir. 1970), quoting prior authority and citing decisions from several circuits stated:

> It is true, of course, that an appellant may not challenge on review the correctness of instructions to which he took no exceptions or only a general exception. Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.A.; *Palmer v. Hoffman*, 318 U.S. 109, 119, 63 S.Ct. 477, 483, 87 L.Ed. 645 and cases cited; *Palmer v. Miller*, 8 Cir., 145 F.2d 926, 930. In that sense, and in that sense only, it may be said that the instructions to which no exceptions are taken become the law of the case for determining whether the instructions are subject to review on appeal. *See Union Pacific Railroad Co. v. Denver-Chicago Trucking Co., Inc.*, 8 Cir., 202 F.2d 31, 37-38. But in determining whether a trial court has erred in denying

> a motion for a directed verdict made at the close of the evidence, *it is the applicable law which is controlling, and not what the trial court announces the law to be in his instructions.* This Court must ascertain for itself what the applicable law is, whether the instructions were excepted to or not. *A proper motion for a directed verdict and its denial will always preserve for review the question whether under the law truly applicable to the case there was an adequate evidentiary basis for the submission of the case to the jury.* 203 F.2d at 862. *See also Johnson v. United States*, 434 F.2d 340, 343 (8th Cir. 1970) (citing *Coca Cola* with approval); *Gorsalitz v. Olin Mathieson Chemical Corporation*, 429 F.2d 1033, 1040 (5th Cir. 1970), *cert. denied*, 407 U.S. 921, 92 S.Ct. 2463, 32 L.Ed.2d 807 (1972) (holding that the question was preserved for review by the motion for a directed verdict). (Emphasis added).

The *Dual Manufacturing* opinion continued by stating:

> In 9 Wright & Miller, Federal Practice and Procedure: Civl ¶ 2558 at 620-71 (1971), the controlling law in the discussion of appellate review is succinctly put as follows:
>
> > Many decisions say that an instruction not objected to becomes the law of the case. This may be merely one way of phrasing the general principle that failure to object ordinarily bars later challenge to an instruction. It appears to have no meaning beyond that.

Id.

More recently the Second Circuit in *Ebker v. Tan Jay International, Ltd.*, 739 F.2d 812, 825-26 n. 17 (2d Cir. 1984), in an appeal from a judgment n.o.v. entered by the district court, stated:

> Although Ebker's counsel chose not to take exception to the instruction with respect to the presump-

tion, his inaction does not render the instruction the "law of the case" for purposes of appellate review of the entry of judgment n.o.v. See 9 Wright & Miller, *supra*, § 2558, at 670-71 ("Many decisions say that an instruction not objected to becomes the law of the case. This may be merely one way of phrasing the general principle that failure to object ordinarily bars later challenge to an instruction. It appears to have no meaning beyond that.") (footnotes omitted). Rather, we must review the district judge's order in light of the "applicable law which is controlling, and not what the trial court announces the law to be in [its] instructions." *Coca Cola Bottling Co. v. Hubbard*, 203 F.2d 859, 862 (8 Cir. 1953). See *Hanson v. Ford Motor Co.*, 278 F.2d 586, 592-93 (8 Cir. 1960) (Blackmun, J.); *Johnson v. United States*, 434 F.2d 340, 343 (8 Cir. 1970); 9 Wright & Miller, *supra*, § 2537, at 599-600.

In short, even had Sterling not preserved its objection to Instruction 28a, this Court is not required thereby to apply a wrong interpretation of the law to the facts of this case.

Also without merit is P&E's attempted distinction between its case and *Will* on the substantive issue of what showing P&E was required to make. P&E argues that "The defendant in *Will* did not have a real interest in the tied product [data processing services] because franchises were authorized by their contracts to use outside sources of data processing services." (P&E's Supp. Mem. at 11). P&E argues this alleged lack of economic interest to be what the *Will* court was referring to when it discussed the absence of defendant's market power in the tied product market. Contrary to P&E's argument, the plaintiffs in *Will* lost not because the evidence was lacking as to defendant's economic interest in the tied product but because of its lack of market power and the lack of danger that defendant would acquire market power in

the tied product market as a result of its conduct. Judge Easterbrook in *Will* did not refer to economic interest. He clearly stated:

> Comprehensive had no market power. For that matter, it is not to be believed that Comprehensive wanted to monopolize (or posed a threat of monopolizing) computation services, the tied product. Competition in the computation business is exceptionally vigorous; plaintiffs' contract case depended on establishing that this vigorous competition made it cheaper to secure computation from venders other than Comprehensive. Even if Comprehensive had some power, then, plaintiffs still must lose. "One of the threshold criteria the plaintiff must satisfy . . . is that there is a substantial danger that the tying seller will acquire market power in the tied product market." *Carl Sandburg Village Condominium Ass'n*, *supra*, 758 F.2d at 210. This case therefore did not need to go to the jury.

The Court need not address all of the issues raised by Sterling's post-trial motion. Judgment notwithstanding the verdict must be entered in favor of Sterling on the antitrust claim because P&E failed to establish a "substantial danger that . . . [Sterling] will acquire market power in the tied product [finished goods, electric motor] market." *Will*, *supra* 776 F.2d at 674. The Court believes, as did the Seventh Circuit in *Will*, the case should not have gone to the jury.

To deal with Sterling's alternative request for a new trial, the Court pursuant to Fed. R. Civ. P. 50(c) conditionally grants Sterling's motion for new trial should the judgment n.o.v. entered today be vacated or reversed. The Court bases this conditional grant of a new trial on the error committed in giving Instruction 28a to the jury over Sterling's objection (Tr. 955) and because of the Court's failure adequately to instruct the jury re-

garding the requirement of substantial danger as to Sterling's acquisition of market power in the tied product market.

CONCLUSION

For the reasons stated herein, Sterling's motion for judgment notwithstanding the verdict is GRANTED and Sterling's motion for new trial is conditionally GRANTED. P&E's post-trial request for attorneys' fees and costs is moot since P&E has not prevailed with regard to its antitrust claim.

ENTER:

/s/ James F. Holderman
JAMES F. HOLDERMAN
United States District Judge

DATED: April 14, 1986

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 9, 1989

Before HON. WILLIAM J. BAUER, *Chief Judge*
HON. RICHARD A. POSNER, *Circuit Judge*
HON. JOHN L. COFFEY, *Circuit Judge*

No. 88-1609

PARTS AND ELECTRIC MOTORS, INC.,
an Illinois corporation,
Plaintiff-Appellee,
vs.

STERLING ELECTRIC, INC., a Delaware corporation,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 83 C 2349 James F. Holderman, *Judge*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by counsel for Defendant-Appellant Sterling Electric, Inc., in the above-

entitled cause, no judge in active service has requested a vote thereon, and a majority* of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is, DENIED.

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* The Honorable Richard A. Posner, Circuit Judge, voted to grant a rehearing.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 2349

PARTS AND ELECTRIC MOTORS, INC.,
Plaintiff

v.

STERLING ELECTRIC, INC.,
Defendant

ORDER

This matter is before the court on remand from the Seventh Circuit for clarification as to whether this court perceived that the jury's verdict, when assessed against the instructions that guided the jury's deliberations, was contrary to the manifest weight of the evidence. *Parts and Electric Motors, Inc. v. Sterling Electric, Inc.* 826 F.2d 712- 721-22 (7th Cir. 1987).

Following the trial, this court granted defendant Sterling's motion for judgment n.o.v. and conditionally granted a new trial. The Court of Appeals for the Seventh Circuit reversed the judgment n.o.v., vacated the judgment conditionally granting a new trial and remanded the case for further proceedings.

This court, having reviewed the record and the positions presented by the parties holds that the jury's verdict was not against the manifest weight of the evidence when assessed in the light of the instructions that guided the jury's deliberations.

The judgment for trebled damages of $3,695,976.00 is entered in favor of plaintiff, Parts and Electric Motors, Inc., and against the defendant, Sterling Electric, Inc.

Post-judgment interest is to be assessed from September 24, 1985. Substantial time has passed since the trial. Consequently, plaintiff's renewed petition for attorneys' fees and costs is to be submitted and filed no later than March 28, 1988. Defendant to respond by April 18, 1988. Plaintiff's reply, if any, is due May 2, 1988.

Dated: February 29, 1988

Enter: /s/ James F. Holderman
U.S. District Court Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number 83 C 2349

PARTS AND ELECTRIC MOTORS, INC.,
Plaintiff

v.

STERLING ELECTRIC,
Defendant

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff, Parts and Electric Motors, Inc., and against the defendant, Sterling Electric, Inc., in the amount of $3,695,976.00 for trebled damages.

February 29, 1988
Date

H. STUART CUNNINGHAM
Clerk

/s/ Kathleen Branch
(By) Deputy Clerk